Supreme Court, U.S.
FILED
01 881 DEC 14 2001
OFFICE OF THE CLERK

No. 01-

IN THE

Supreme Court of the United States

GENERAL ELECTRIC CAPITAL CORP., d/b/a GE CAPITAL, MONTGOMERY WARD CREDIT SERVS., INC., f/k/a, MONOGRAM RETAILER CREDIT SERVICES, INC.,

Petitioners,

v.

GARY A. THIESSEN,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

STEVEN T. CATLETT
JONES, DAY, REAVIS & POGUE
77 West Wacker Drive
Chicago, IL 60601
(312) 782-3939

GLEN D. NAGER
(Counsel of Record)
LAWRENCE D. ROSENBERG
DOMINICK V. FREDA
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

Counsel for Petitioners

218 pp

QUESTIONS PRESENTED

1. Whether, in determining if a case may proceed as a class or collective action, a district court is prohibited from making factual findings on certification issues that overlap with merits issues?

2. Whether, in a private suit seeking damages from a jury for an alleged pattern-or-practice of discrimination, a district court must use the multi-stage trial plan embraced in *Teamsters v. United States*, 431 U.S. 324 (1977), in deciding whether to certify a class?

3. Whether the timely claims brought by a named plaintiff in a proposed class can properly serve as the basis for resurrecting both that plaintiff's stale claims and the stale claims of other putative plaintiffs through application of the "continuing violation" doctrine—an issue that overlaps with the issue presented in *National Railroad Passenger Corp. v. Morgan,* 121 S. Ct. 2547 (2001)?

PARTIES TO THE PROCEEDINGS

All parties to the proceedings below are listed in the captions except for the following opt-in plaintiffs: Julia-Bates Allgood; Gene Autry; Pamela S. Chudyba; Gwen Colwell; Barbara A. Croy; Jan L. Cullison; Robert DeMartine; Don B. Farrow; James C. Flower; Lawrence P. Fries; Terry M. Grisham; Elain Hayden; Melva Heid; Linda L. Hess; Delilah N. Hicks; Billie M. Huddleston; Christopher P. Kaesberg; Eugene Laurenzo; James Lawson; Brenda Lewis; Marjorie Manson; Robert Marsonette; Larry Nobles; Ray Osburn; Kimberly Perron; Diana Polsinelli; Artemio Robles; Patricia Serra; Salli J. Shirey; and Janice F. Trice.

Petitioners are General Electric Capital Corporation and Montgomery Ward Credit Services. General Electric Capital Corporation's corporate parent is General Electric Company, which is publicly-traded. Montgomery Ward Credit Services was officially dissolved on June 4, 2001, with all remaining assets and liabilities assumed by General Electric Capital Corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINIONS AND JUDGMENTS BELOW 1

JURISDICTIONAL STATEMENT 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE WRIT 7

I. THE TENTH CIRCUIT'S DECISION DEEPENS A MATURE CIRCUIT SPLIT CONCERNING THE PERMISSIBILITY OF MAKING FACTUAL FINDINGS ON CERTIFICATION ISSUES THAT OVERLAP WITH THE MERITS 9

A. The Decision Below Deepens A Mature Split Of Authority Among the Courts of Appeals 10

B. The Decision Below Involves A Critical And Recurring Issue of Class Action Law 14

II. THE DECISION BELOW DEEPENS A MATURE SPLIT OF JUDICIAL AUTHORITY ON THE PROPER APPLICATION OF *TEAMSTERS V. UNITED STATES* 16

A. The Decision Below Deepens A Mature Conflict Among The Courts of Appeals About *Teamsters* 17

TABLE OF CONTENTS
(continued)

Page

B. The Decision Below Is Severely Flawed And Reveals Further Subsidiary Judicial Conflicts 20

III. THE TENTH CIRCUIT'S TIMELINESS RULINGS DEEPEN SPLITS OF JUDICIAL AUTHORITY ON IMPORTANT AND RECURRING ISSUES 25

A. The Decision Below Broadens Three Splits Of Authority Among The Courts Of Appeals . 25

B. Judicial Extension Of The Continuing Violation Doctrine Implicates Important And Recurring Questions Of Federal Law That Merit Review 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases

Alexander v. Local 496, 177 F.3d 394 (6th Cir. 1999), *cert. denied*, 528 U.S. 1154 (2000) 27
Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998) 18
Ardrey v. United Parcel Service, 798 F.2d 679 (4th Cir. 1986) 23
Banas v. America Airlines, 969 F.2d 477 (7th Cir. 1992); 29
In re Beverly Hills Fire Litig., 695 F.2d 207 (6th Cir. 1982) 22
Blair v. Equifax Check Servs., Inc., 181 F.3d 832 (7th Cir. 1999) 15
Blyden v. Mancusi, 186 F.3d 252 (2d Cir. 1999) 24
Bonner v. Guccione, 178 F.3d 581 (2d Cir. 1999) 26
Caridad v. Metro-North Commuter R.R., 191 F.3d 283 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000) 10, 11
Carter v. West Publ'g Co., 225 F.3d 1258 (11th Cir. 2000) 20
Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996) 18
Cimino v. Raymark Indus., 151 F.3d 287 (5th Cir. 1998) 24
Coates v. Johnson & Johnson, 756 F.2d 524 (7th Cir. 1985) 23
Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 15
Delaware State College v. Ricks, 449 U.S. 250 (1980) 30
Domingo v. New England Fish Co., 727 F.2d 1429 (9th Cir. 1984) 28, 29

TABLE OF AUTHORITIES
(continued)

Page

East Texas Motor Freight Sys. Inc. v. Rodriguez, 431 U.S. 395 (1977) 14, 20
Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 10, 15
Gen. Tel. Co. v. Falcon, 457 U.S. 147 (1982) .. 12, 15, 20
Gipson v. KAS Snacktime Co., 83 F.3d 225 (8th Cir. 1996) 29
Green v. Los Angeles Cnty. Super. of Sch., 883 F.2d 1472 (9th Cir. 1989) 26
Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208 (11th Cir. 2001) 28
Huckabay v. Moore, 142 F.3d 233 (5th Cir. 1998); 29
Hull v. Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Educ., 926 F.2d 505 (6th Cir. 1991); 26
Jackson v. Motel 6 Multipurpose Inc., 130 F.3d 999 (11th Cir. 1997) 19, 24
Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894 (7th Cir. 1999) 19, 20, 21, 23
Johnson v. Ry. Express Agency, Inc., 421 U.S. 454 (1975) 30
Johnston v. HBO Film Mgmt., Inc., 265 F.3d 178 (3d Cir. 2001) 13
Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976) 29
Lockart v. Westinghouse Credit Corp., 879 F.2d 43 (ed Cir. 1989) 21
Lorillard v. Pons, 434 U.S. 575 (1978), ... 16
Lowery v. Circuit City Stores, Inc., 158 F.3d 742 (4th Cir. 1998), *vacated on other grounds by* 527 U.S. 1031 (1999), *remanded to*, 206 F.3d 431, *cert. denied*, 531 U.S. 822 (2000) 19

TABLE OF AUTHORITIES
(continued)

Page

Lusardi v. Xerox Corp., 118 F.R.D. 351 (D.N.J. 1987), *rev'd in part on other grounds*, 855 F.2d 1062 (3d Cir.), *on remand*, 122 F.R.D. 463 (D.N.J. 1988) 13, 24
Madison v. IBP, Inc., 257 F.3d 780 (8th Cir. 2001) 26
Malcolm v. Nat'l Gypsum Co., 995 F.2d 346 (2d Cir. 1993) 22
Miller v. Hygrade Food Prods. Inc., 198 F.R.D. 638 (E.D. Pa. 2001) 22
Miller v. Int'l Tel. & Tel. Corp., 755 F.2d 20 (2d Cir. 1985) 29
Mooney v. Aramco Servs. Co., 54 F.3d 1207 (5th Cir. 1995) 13, 21
Movement for Opportunity & Equality v. General Motors Corp., 622 F.2d 1235 (7th Cir. 1980) 28
Nat'l R.R. Passenger Corp. v. Morgan, 121 S. Ct. 2547 (2001) ..... *passim*
Patterson v. Mobil Oil Corp., 841 F.3d 417 (5th Cir. 2001) 22
Payne v. Travenol Labs., Inc., 673 F.2d 798 (5th Cir. 1982) 28
Perez v. Laredo Junior College, 706 F.2d 731 (5th Cir. 1983) 26, 27
Provencher v. CVS Pharmacy, 145 F.3d 5 (1st Cir. 1998) 26
In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995) 10, 23
Robinson v. Metro-North Commuter R.R., 267 F.3d 147 (2d Cir. 2001) 17,18, 24
Rush v. Scott Specialty Gases, Inc., 113 F.3d 476 (3d Cir. 1997) 26, 27

TABLE OF AUTHORITIES
(continued)

Page

Rutstein v. Avis Rent-A-Car System, Inc., 211 F.3d 1228 (2000), *cert. denied*, 121 S. Ct. 1354 (2001) 18, 19, 20, 24, 25
Shehadeh v. Chesapeake & Potomac Tel. Co., 595 F.2d 711 (D.C. Cir. 1978) 26
Shelton v. Pargo, Inc., 582 F.2d 1298 (4th Cir. 1978) 13
Smith v. Texaco, Inc., 263 F.3d 394 (5th Cir. 2001) 18, 19, 23, 24
Stastny v. Southern Bell Tel. & Tel.Co., 628 F.2d 267 (4th Cir. 1980) 12, 13
Szabo v. Bridgeport Mach., Inc., 249 F.3d 672 (7th Cir.), *cert. denied*, 122 S. Ct. 348 (2001) . 11, 12, 14
Taylor v. Home Ins. Co., 777 F.2d 849 (4th Cir. 1986) 26
Teamsters v. United States, 431 U.S. 324 (1977) ..... *passim*
Valentino v. Carter-Wallace, Inc., 97 F.3d 1227 (9th Cir. 1996) 10, 11
West v. Phila. Elec. Co., 45 F.3d 744 (3d Cir. 1995) ... 29
Western Elec. Co. v. Stern, 544 F.2d 1196 (3d Cir. 1976) 23
Wetzel v. Liberty Mut. Life Ins. Co., 508 F.2d 239 (3d Cir. 1975) 28
Windham v. American Brands, Inc., 565 F.2d 59 (4th Cir. 1977) 24
Wright v. Circuit City Stores, Inc., 201 F.R.D. 526 (N.D. Ala. 2001) 13

Statutes & Rules

28 U.S.C. §1254(1) 1
28 U.S.C. § 1291 1
28 U.S.C. § 1331 1

TABLE OF AUTHORITIES
(continued)

Page

29 U.S.C. § 216(b) 1
29 U.S.C. § 621 *et seq.* 1
29 U.S.C. § 626(b) 2
29 U.S.C. § 626(d) 25
42 U.S.C. §1981a(a) 16
42 U.S.C. § 2000e-5(f) 17

Miscellaneous

Phyllis T. Baumann *et al.*, *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. Rev. 211 (1992) 115

Keith R. Fentonmiller, *Damages, Jury Trials and the Class Action Under the Civil Rights Act of 1991*, 12 Lab. Law. 421 (1997) 23

Judith J. Johnson, *Rebuilding the Barriers: The Trend in Employment Discrimination Class Actions*, 19 Colum. Hum. Rts. L. Rev. 1 (1986) 15

Judicial Business of the United States Courts: 1998 Report of the Director (1998) 14

Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-the-Board-Employment Discrimination Cases*, 15 Lab. Law. 415 (2000) 20

2 Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* (3d ed. 1996) 25

Barlett H. McGuire, *The Death Knell for Eisen: Why the Class Action Analysis Should Include an Assessment of the Merits*, 168 F.R.D. 366 (1996) 10, 15

TABLE OF AUTHORITIES
(continued)

Page

Charles S. Mishkind & V. Scott Kneese, *Big Risks and Opportunities, Class Actions and the Pattern and Practice Cases*, 662 PLI/LIT 403 (2001) 20

Ramona L. Paetzold & Anne M. O'Leary-Kelly, *Continuing Violations and Hostile Environment Sexual Harassment: When Is Enough, Enough?*, 31 Am. Bus. L.J. 365 (1993) 25

Daniel F. Piar, *The Uncertain Future of Title VII Class Actions After the Civil Rights Act of 1991*, 2001 BYU L. Rev. 305 (2001) 19, 23

Scotty Shively, *Resurgence of the Class Action Lawsuit in Employment Discrimination Cases: New Obstacles Presented by the 1991 Amendments to the Civil Rights Acts*, U. Ark. Little Rock L. Rev. 925 (2001) 16

Brief for United States as Amicus Curiae Supporting Petitioner, *Nat'l R.R. Passenger Corp. v. Morgan*, No. 00-1614 27

PETITION FOR A WRIT OF CERTIORARI

Petitioners General Electric Capital Corporation and Montgomery Ward Credit Services seek a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

OPINIONS AND JUDGMENTS BELOW

The court of appeals entered an order on September 28, 2001, granting petitioners' petition for rehearing, withdrawing its opinion of July 3, 2001, reported at 255 F.3d 1221 (Pet. App. 27a-51a), and substituting a revised opinion therefor, which is reported at 267 F.3d 1095 (Pet. App. 1a-26a). The relevant opinions of the district court are reported at 13 F. Supp. 2d 1131 (Pet. App. 52a-97a), and 996 F. Supp. 1071 (98a-128a).

JURISDICTIONAL STATEMENT

The district court had original jurisdiction under 28 U.S.C. § 1331. The court of appeals had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Fifth and Seventh Amendments of the United States Constitution, and relevant portions of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, and of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b), are set forth in the appendix. Pet. App. 129a-161a.

STATEMENT

1. Respondent Gary A. Thiessen began his career in 1968 with a predecessor of petitioner, Montgomery Ward Credit ("MWC"). Pet. App. 28a. From 1972 to mid-1994, he held various management positions with MWC. *Id.* Between May 1994 and August 1996, Thiessen was placed on special assignments, and was transferred in 1996. Pet. App. 28a-29a. As early as 1993, Thiessen became aware that he was on a so-

called "blocker" list of older employees allegedly targeted for discriminatory treatment because they were "blocking" the advancement of younger workers. (Pet. App. 86a) He did not, however, file a charge of employment discrimination against MWC and co-petitioner, General Electric Capital Corporation ("GECC"), until February 5, 1996. Pet. App. 29a. In that charge, he alleged that, because of his age and race, petitioners had (i) sought to "phase him out" in 1994 through "special assignment"; (ii) downgraded his performance in 1993 and 1994; and (iii) denied him promotions in 1993 and 1995. Pet. App. 29a, 31a.

2. On September 23, 1996, Thiessen filed this action, raising the individual claims set out in his EEOC charge. Pet. App. 99a. On November 18, 1996, Thiessen filed a First Amended Complaint (Pet. App. 162a), making class allegations for the first time and seeking permission to have "similarly situated" individuals opt-in as plaintiffs, pursuant to 29 U.S.C. § 626(b), which incorporates 29 U.S.C. § 216(b) of the FLSA.

a. By the August 1, 1997 opt-in deadline set by the district court, 30 individuals had sought to join the litigation. Pet App. 99a. On February 5, 1998, the district court conditionally certified a class and allowed 22 of the 30 putative opt-ins to join the case. Pet. App. 98a.

The court found that, because none of the 30 opt-ins had filed EEOC charges, the limitations period for all opt-ins would be the one applicable to Thiessen's charge—*i.e.*, 300 days before February 5, 1996, or April 11, 1995. Pet App. 103a-111a. The court dismissed as time-barred eight putative plaintiffs whose claims arose before April 1995. Pet. App. 110a-111a.

With respect to the remaining 22 opt-ins, the district court noted that they "have held dozens of different positions across seven states"; were "supervised by different individuals"; and challenge "widely varying adverse employment actions

spanning nearly ten years," ranging "from failure to promote, failure to transfer, layoff and constructive discharge to downgraded performance evaluations and discrimination in job assignments and training." Pet. App. 101a-102a. Nonetheless, given the incomplete record, and despite "grave misgivings," the court concluded that Thiessen's evidence of an "alleged company-wide policy of age discrimination (*i.e.* the "blocker" policy) rendered the opt-in plaintiffs similarly situated despite such differences in employment situations and claims," for purposes of conditional certification. Pet. App. 113a, 117a.

The court indicated that it would reconsider certification after discovery. Pet. App. 121a. In that regard, the court noted that the record was devoid of proof that the alleged "blocker" policy had any causal connection to any timely claims and that, if defendants presented individualized defenses to the claims, "this case may be in danger of passing" the "realistic limit on what a jury may reasonably be expected to absorb, retain and process . . . ." Pet. App. 121a, 124a. The court also held that Thiessen's proposed trial plan of "bifurcating the trial of this action into a liability phase and a remedy phase" in a manner that would bar defendants from "rais[ing] individual defenses until the remedial phase . . . would be unduly prejudicial to the defendants," because "defendants' explanations with respect to each adverse employment action are critical to the liability issue," and because "such an approach in the context of a jury trial would be subject to serious constitutional challenges." Pet. App. 124a n.22.

b. After discovery, the district court decertified the class and dismissed the opt-in plaintiffs. Pet. App. 52a. Carefully noting that it was "not resolving the underlying merits of plaintiffs' claims," the court found that Thiessen was not "similarly situated" to the proposed class, because Thiessen had "concede[d] that the only possible common thread among the plaintiff group is the existence of the blocker policy," and

because there was no record evidence of any "link between the policy and the challenged employment actions." Pet. App. 62a. The court also found that "individual issues would predominate at trial" given the "numerous, particularized" defenses proffered by defendants. Pet. App. 70a. Finally, the court held that plaintiffs' proposed two-stage trial plan, based on *Teamsters v. United States*, 431 U.S. 324 (1977), "render[ed] individualized consideration of the claims impossible and impose[d] extraordinary burdens on the jury." Pet. App. 75a-76a. The court also granted petitioners' motion for summary judgment on Thiessen's individual claims. Pet. App. 76a-96a. Among other things, the court found that there was not "sufficient evidence for a reasonable fact finder to conclude that an application of the [blocker] policy occurred within the limitations period." And, based on this conclusion, the district court found that the "continuing violation theory" should not revive stale claims. Pet. App. 85a.

3. A panel of the Tenth Circuit reversed. Pet. App. 27a. The panel found that the "problem" with the district court's analysis was "that plaintiffs were asserting a pattern-or-practice claim modeled on [*Teamsters*]," and that the district court had "failed to recognize the pattern-or-practice nature of the class claim." *Id.*

a. Specifically, the panel first held that, under prior Rule 23 cases in that circuit, a district court must "avoid focusing on the merits of the underlying class action." Pet. App. 41a. On that premise, the panel held that the district court had committed error because its commonality inquiry—*i.e.*, "whether a sufficient link existed between the alleged blocker policy and the challenged employment decisions"—"encompasse[d] factual issues relevant to . . . the pattern-or-practice" trial on the merits. *Id.* The panel held that "it was improper for the district court to consider, and effectively make findings regarding, these questions in determining whether the plaintiffs were similarly situated for purposes of certifying a class." *Id.* Doing so, the panel em-

phasized, "effectively deprived plaintiffs of [the] procedural advantage" that, "if plaintiffs were able to establish a pattern or practice of discrimination [in the first stage of trial], they would be entitled to a presumption that the individual employment actions taken against them were the result of such discrimination." Pet. App. 42a.

b. With regard to the individualized defenses issue, the panel held that the district court's judgment "was likewise adversely affected by its failure to recognize that plaintiffs were proceeding under a pattern-or-practice theory." Pet. App. 42a. The panel asserted that, under *Teamsters,* "the initial focus in a pattern-or-practice case is not on individual employment decisions, 'but on a pattern of discriminatory decision-making.'" Pet. App. 40a (citation omitted). The panel then held that, under its view of *Teamsters,* although petitioners "asserted 'highly individualized' defenses to each of the instances of individual discrimination asserted by plaintiffs," "those defenses would not become the focal point until the second stage of trial and could be dealt with in a series of individual trials, if necessary." Pet. App. 42a. Accordingly, the panel held that "the presence of the 'highly individualized' defenses did not, as the district court concluded, outweigh any potential benefits in proceeding as a collective action." *Id.*

c. The panel further held that, for purposes of the class certification determination, the district court's rejection of Thiessen's proposed multi-stage trial plan "was also adversely affected by its failure to recognize the pattern-or-practice nature of plaintiffs' claim." Pet. App. 43a. The panel asserted that "the district court failed to acknowledge that" plaintiffs' proposed trial plan, "though perhaps deficient in some respects, was consistent with the framework outlined in *Teamsters* for pattern-or-practice claims." *Id.* The panel did not otherwise address the constitutional deficiencies that petitioners had noted and that had concerned the district court. *See id.*

d. Regarding the timeliness issues, the panel applied the "continuing violation" doctrine to hold that pre-April 1995 claims were not time-barred and could be resurrected. Pet. App. 48a-49a. First, the court held that, because Thiessen claimed that the alleged "blocker" policy constituted a "continuing violation" beginning in 1993 and continuing into the 1995 limitations period, he could bring his otherwise time-barred claims. Pet. App. 48a. Specifically, the court held that, if "Thiessen can substantiate his allegations, the time frame for his claims would generally be from September 1993 through 1995." *Id.* Second, the court extended its application of the "continuing violation" doctrine to opt-in plaintiffs whose claims the district court had found to be time-barred (because they had occurred *before* April 1995), holding that, "at this stage of the proceedings," the class should "include all those plaintiffs whose related claims (*i.e.*, adverse employment actions resulting from application of the blocker policy) arose between September 1993 and 1995." *Id.* The panel directed the district court to determine on remand which of the eight dismissed plaintiffs would have timely claims under this standard. Pet. App. 49a.

4. The panel granted a petition for rehearing and substituted a slightly revised opinion for its earlier one. Pet. App. 1a. Among other things, the panel revised its opinion to state simply that: "The problem is that the district court effectively made findings regarding these issues in the guise of determining whether plaintiffs were 'similarly situated.'" Pet. App. 16a. The panel also added the following paragraph:

> A district court considering a motion to certify [or decertify] is entitled to look past the pleadings and examine the evidence produced during discovery, but when an ADEA plaintiff relies upon a "pattern or practice" theory and comes forward with legitimate evidence to support that theory, the district court must take into account the framework for pattern-or-practice cases outlined by the Supreme Court in [*Teamsters*]. That did not occur in this

> case, and hence our application of those factors using the correct legal framework. We do not hold that whenever there is evidence of a pattern-or-practice, a class must be certified. Whether certification or decertification is appropriate depends upon application of the factors we have identified in the ad hoc approach.

Pet. App. 18a.

REASONS FOR GRANTING THE WRIT

This case presents enormously important questions of class action law and employment law. *First*, relying on Rule 23 cases, the court below read into class certification analysis a requirement that a district court not make findings on commonality or predominance issues if those issues overlap with the merits. *Second*, the court below held that, in assessing class certification, a district court must use the *Teamsters* multi-stage trial structure, even for juriable claims for damages. *Third*, the court below held that the "continuing violation" doctrine overrode the statute of limitations and permitted not only the named plaintiff but all class members to resurrect stale claims. These holdings are in serious error and conflict with decisions of numerous other courts.

As the district court noted, the plaintiff class here sought to challenge "widely varying adverse employment actions spanning nearly ten years," ranging from "failure to promote, failure to transfer, layoff and constructive discharge to downgraded performance evaluations and discrimination in job assignments and training." Pet. App. 102a. Faced with such varied and stale allegations, the district court found insufficient commonality and predominance to warrant class treatment, because there was no record evidence of any "link between the policy and the challenged employment actions," because there were highly individualized defenses, and because plaintiffs had "not produced sufficient evidence for a reasonable fact-finder to conclude that an application of the policy occurred within the limitations period." Pet. App. 62a, 85a. The district court

also found that plaintiffs' proposed two-stage trial plan "render[ed] individualized consideration of the claims impossible and impose[d] extraordinary burdens on the jury." Pet. App. 75a-76a. Indeed, the court had found that "such an approach in the context of a jury trial would be subject to serious constitutional challenges." Pet. App. 124a n.22.

Despite these findings, the court below reversed, holding that these uncommon, unmanageable, and stale claims for legal relief should be certified for class treatment, lest plaintiffs be "deprived" "of [the] procedural advantage" of "a presumption that the individual employment actions taken against them were the result of . . . discrimination." Pet. App. 42a. In so doing, the court below invoked *Teamsters*, a case involving governmental claims for *equitable* relief to be resolved by bench trial, and mechanically applied it to a case involving private claims for *legal* relief to be resolved by jury trial, even though *Teamsters* was not a class action case, even though *Teamsters* itself warned that "not all class actions will necessarily follow" the multi-stage trial model used there, 431 U.S. at 360, and even though claims for legal relief on juriable issues raise obvious case management and constitutional issues that do not arise in bench trials of claims for equitable relief.

The Tenth Circuit's decision is not only erroneous and a gross intrusion on the case management authority of the district court, it deepens mature splits of judicial authority on three critical issues of law that merit this Court's review:

First, this case presents the fundamental question whether, in determining if a case may properly proceed as a class or collective action, a district court is prohibited from making factual findings on issues overlapping with the merits.

Second, this case presents the issue whether, in a private suit seeking legal relief from a jury for an alleged pattern-or-practice of discrimination, a district court must use the

multi-stage trial plan embraced in *Teamsters* in deciding whether to certify a class.

Third, this case presents the issue, vital to almost all employment law actions, of whether the timely claims brought by a named plaintiff of a proposed class can serve as a proper basis for resurrecting that plaintiff's stale claims and the stale claims of the opt-in plaintiffs through application of the "continuing violation" doctrine.

All three of these questions have deeply and directly divided the courts of appeals; all three questions arise frequently and are of national importance; and the third question in fact overlaps with the issues presented in *National Railroad Passenger Corp. v. Morgan*, 121 S. Ct. 2547 (2001).

I. THE TENTH CIRCUIT'S DECISION DEEPENS A MATURE CIRCUIT SPLIT CONCERNING THE PERMISSIBILITY OF MAKING FACTUAL FINDINGS ON CERTIFICATION ISSUES THAT OVERLAP WITH THE MERITS

Relying on cases addressing certification of Rule 23 class actions, the court below held that, in the course of its certification analysis, the district court had to "avoid focusing on the merits of the underlying class action." Specifically, while the amended opinion on rehearing clarifies that it is permissible "to look past the pleadings," the Tenth Circuit still held (based on Rule 23 cases) that it was improper for the district court to "ma[k]e findings" on commonality and predominance issues that overlapped with the merits—namely, the lack of a link to and repudiation of the alleged "blocker" policy, because those findings "encompasse[d] factual issues relevant to both the first and second stages of [a *Teamsters*] trial." Pet. App. 15a-16a. That holding plainly warrants this Court's review.

A. The Decision Below Deepens A Mature Split Of Authority Among the Courts of Appeals

The courts of appeals are in substantial conflict regarding whether a district court may, in the course of a class certification inquiry, make findings on issues that overlap with the merits. *See, e.g.*, Bartlett H. McGuire, *The Death Knell for Eisen: Why the Class Action Analysis Should Include an Assessment of the Merits*, 168 F.R.D. 366, 392-93 (1996) (explaining that "there are many splits in authority [among the courts of appeals] regarding the appropriateness of such inquiries").

The Tenth Circuit's holding that a district court may not make findings on class certification issues that overlap with the merits is consistent with the Second Circuit's decision in *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283, 293 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000), and the Ninth Circuit's decision in *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1232 (9th Cir. 1996). In *Caridad*, the Second Circuit held that it was improper for the district court to find that plaintiffs' statistical proffer was inadequate to establish commonality because, "[i]n deciding a certification motion, district courts must not consider or resolve the merits of the claims of the purported class." *See* 191 F.3d at 293. In so holding, the Second Circuit relied upon this Court's statement in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), that "nothing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." Similarly, in *Valentino*, the Ninth Circuit relied upon the same passage in *Eisen* to criticize (97 F.3d at 1232) the Seventh Circuit's examination of issues pertinent to the merits of the case in the course of ruling on class certification in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1232 (7th Cir. 1995). The *Valentino* court noted that, under *Eisen*, a court should not

hold "a separate hearing to consider the merits of plaintiffs' claims when determining class certification. *See Valentino*, 97 F.3d at 1232 (citing, *inter alia*, *Eisen*, 417 U.S. at 177-78).

These holdings are in direct conflict with not only *Rhone-Poulenc Rorer*, but also with *Szabo v. Bridgeport Mach., Inc.*, 249 F.3d 672 (7th Cir.), *cert. denied*, 122 S. Ct. 348 (2001). There, in an opinion by Judge Easterbrook, the Seventh Circuit held that a district court had erroneously "certified the class without resolving factual and legal disputes that strongly influence the wisdom of class treatment," including issues that "overlap the merits." *Id.* at 675, 676.

In so holding, the Seventh Circuit emphasized that, in contrast to an order denying a motion to dismiss under Rule 12(b)(6), "an order certifying a class usually is the district judge's last word on the subject; there is no later test of the decision's factual premises (and, if the case is settled, there could not be such an examination even if the district judge viewed the certification as provisional). Before deciding whether to allow a case to proceed as a class action, therefore, a judge should make whatever factual and legal inquiries are necessary . . . ." *Id.* at 676. The court reasoned that the case management inquiries mandated by class action rules such as Rule 23(b)(3) may "overlap the merits" but still require resolution, even if that resolution requires a "preliminary inquiry into the merits." *Id.*

With respect to this Court's decision in *Eisen*, the Seventh Circuit stated that:

> A court may not say something like "let's resolve the merits first and worry about the class later" (Rule 23(c)(1) requires the certification decision to be made "[a]s soon as practicable after the commencement of an action brought as a class action") or "I'm not going to certify a class unless I think that the plaintiffs will prevail." But nothing in the 1966 amendments to Rule 23, or the opinion in *Eisen*,

> prevents the district court from looking beneath the surface of a complaint to conduct the inquiries identified in that rule and exercise the discretion it confers. Plaintiffs cannot tie the judge's hands by making allegations relevant to both the merits and class certification.

Id. at 677. Indeed, the Seventh Circuit noted (*id.*) that a contrary ruling would conflict with *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982), where this Court held that a court's class certification determination "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." 457 U.S. at 160.

The decision below also directly conflicts with the Fourth Circuit's decision in *Stastny v. Southern Bell Telephone & Telegraph Co.*, 628 F.2d 267 (4th Cir. 1980). There, in an employment discrimination "pattern or practice" case, the Fourth Circuit held that "the class action and merit inquiries essentially coincide," because determining the class issues "in effect requires answering the substantive question whether . . . there exists the requisite 'pattern or practice' sufficiently and comparably affecting an identifiable class of protected employees" *Id.* at 274. The Fourth Circuit also noted that:

> Intertwining of class action inquiry with merits inquiry is of course not confined to Title VII actions, but the degree of coincidence is perhaps unique in Title VII cases such as the instant one where there exist critical substantive issues of the very existence and scope of any practice having sufficiently "common" effects on an alleged class. A consequence where this degree of coincidence exists is that fair determination of the propriety of class action may be exceedingly difficult without conducting an inquiry roughly comparable to that required to resolve the "pattern or practice" issue on the merits.

Id. Concluding that a rigorous class certification inquiry nonetheless was required, the Fourth Circuit reversed the district court's grant of class certification because the "pattern or practice" record evidence did not support a finding of the requisite commonality. *See id.* at 276-80.

The decision below also conflicts with the Fifth Circuit's decision in *Mooney v. Aramco Services Co.*, 54 F.3d 1207 (5th Cir. 1995), another ADEA "pattern-or-practice" case. There, the Fifth Circuit affirmed the district court's decision denying certification, holding that the district court had been required to "make[] a factual determination" on whether plaintiffs' claims were in fact common. *Id.* at 1214-16.

Other federal courts similarly have held that it is necessary to make factual findings on class issues that overlap with the merits, particularly in pattern-or-practice cases. *See, e.g., Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987) (making numerous factual findings in ADEA "pattern or practice" case on issues overlapping with the merits), *rev'd in part on other grounds*, 855 F.2d 1062 (3d Cir.), *on remand*, 122 F.R.D. 463 (D.N.J. 1988)); *Wright v. Circuit City Stores, Inc.*, 201 F.R.D. 526, 542 (N.D. Ala. 2001) (denying certification because of decentralized decision-making); *see also Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1312 (4th Cir. 1978) ("An intelligent decision on class certification requires at least a preliminary exploration of the merits of the plaintiff's claim. Based on that exploration, the court must make specific findings establishing that the case satisfies the several requirements for certification."); *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 189 (3d Cir. 2001) (approving district court's "finding that . . . plaintiffs' case actually is based on individualized misrepresentations" and thus there is no predominance because it is "necessary" for the district court "to examine the factual record underlying plaintiffs' allegations in making its certification decision").

Indeed, it simply makes no sense to bar a district court from making findings on commonality or other certification issues that overlap with the merits. Doing so effectively prevents trial courts from paying "careful attention to the requirements of [Rule] 23," *East Texas Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977), or other such class certification rules. It is inconsistent to direct trial courts to determine whether enumerated criteria are satisfied, but then hold, as the Tenth Circuit did here, that findings concerning certain of those criteria become improper if they overlap with merits issues. Such an approach allows the procedural posture to improperly drive the outcome of the certification question, and, as Judge Easterbrook noted, permits "[p]laintiffs [to] tie the judge's hands" by developing their claims in such a way as to create overlaps with the class certification criteria. *Szabo*, 249 F.3d at 677. Moreover, such findings do not deprive plaintiffs of any summary judgment or jury trial right, as such class findings are based on a different standard, are made for class certification purposes only, and are not entitled to preclusive effect for purposes of the merits inquiry. The court below erred in suggesting to the contrary.

B. The Decision Below Involves A Critical And Recurring Issue of Class Action Law

This Court should not allow the split in judicial authority on this issue of law to continue to fester. Although this case itself arises under the ADEA, the court below relied on cases applying Rule 23 in making its decision; and Rule 23 applies generally to class actions. For that reason, the question presented here arises with great frequency; according to the most recent available statistics, in 1998 alone, there were over 3,000 class actions pending in the district courts, and over 1,800 more were filed that year. *Judicial Business of the United States Courts: 1998 Report of the Director*, Tables X-4, X-5 (1998).

The need for guidance on the question presented is especially important in this context, because certification has profound implications for the need and likelihood of continuing, settling, or otherwise resolving a class action. On the one hand, "[f]or some cases the denial of class status sounds the death knell of the litigation, because the representative plaintiff's claim is too small to justify the expense of litigation," while, on the other hand, "a grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (Easterbrook, J.); *accord Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may feel it economically prudent to settle and to abandon a meritorious defense.").

Indeed, the need for guidance in part arises from competing statements from this Court that, although a trial court lacks "any authority to conduct a preliminary inquiry into the merits of a suit," *Eisen*, 417 U.S. at 177, the propriety of class certification "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Falcon*, 457 U.S. at 160. As commentators have noted, this tension in the Court's own cases creates confusion and requires clarification from this Court. McGuire, *supra,* at 392; *accord, e.g.,* Judith J. Johnson, *Rebuilding the Barriers: The Trend in Employment Discrimination Class Actions*, 19 Colum. Hum. Rts. L. Rev. 1, 42 (1986) (arguing that "the commonly cited language in *Eisen* must be reconciled with the Supreme Court's pronouncement in *Falcon* that there must be significant proof of a policy of discrimination which manifests itself in the same way," and that as a result, "the question is no longer whether proof of the merits will be required, but how much"); *see also* Phyllis T. Baumann *et al.*, *Substance in the Shadow of*

Procedure: The Integration of Substantive and Procedural Law in Title VII Cases, 33 B.C. L. Rev. 211, 266 (1992) ("Once the *Falcon* Court ordered that there be a close nexus between the claim of the class representative and every member of the class, it was inevitable that the lower courts would take a closer look at the facts and the law, that is, at the merits of the claim.").

II. THE DECISION BELOW DEEPENS A MATURE SPLIT OF JUDICIAL AUTHORITY ON THE PROPER APPLICATION OF *TEAMSTERS V. UNITED STATES*

Review by this Court also is warranted to resolve substantial judicial conflicts over the proper application of this Court's decision in *Teamsters v. United States*, 431 U.S. 324 (1977). *Teamsters* embraced a multi-stage trial approach to pattern-or-practice employment cases filed by the government seeking *equitable* relief in a bench trial. The proper application of that model to age discrimination cases and, after the Civil Rights Act of 1991, to Title VII cases—proceedings where jury trials and monetary and liquidated damages are available, *see* 42 U.S.C. §1981a(a)(1), (c) (Title VII); *Lorillard v. Pons*, 434 U.S. 575, 578-84 (1978) (ADEA)—has generated deep circuit splits on important and recurring issues of federal law that merit this Court's review. This case presents an excellent vehicle for addressing and resolving these judicial conflicts: the district court here refused to apply a multi-stage trial plan because it found that such a plan would be unmanageable, prejudicial, and subject to serious constitutional challenges; and yet the court of appeals held that, while not every "pattern or practice" claim must be certified, the *Teamsters* multi-stage trial approach is *mandatory* in making such a certification decision, even in a case with a jury trial in which legal relief is sought. This Court plainly needs to clarify when and how *Teamsters* applies. *See* Scotty Shively, *Resurgence of the Class Action*

Lawsuit in Employment Discrimination Cases: New Obstacles Presented by the 1991 Amendments to the Civil Rights Act, 23 U. Ark. Little Rock L. Rev. 925 (2001) ("It is just a matter of time before the Supreme Court grants certiorari to resolve the issue of whether . . . actions seeking monetary damages and jury trials are appropriate for class certification").

A. The Decision Below Deepens A Mature Conflict Among The Courts of Appeals About *Teamsters*

Teamsters was an EEOC action under 42 U.S.C. § 2000e-5(f) seeking equitable relief in a bench trial for an alleged "pattern and practice" of employment discrimination. Expressly noting that "not all class actions will necessarily follow [this] model," 431 U.S. at 360, the Court embraced a multi-stage trial plan in which the trial court would first determine whether there was a "pattern or practice" of discrimination, and then in later stages of that bench trial determine whether particular employees were victims of it. *Id.* at 359-61. The lower courts have since struggled with the question whether this multi-stage trial approach can properly be applied in the significantly different context of juriable claims for legal relief, and have reached inconsistent results in making class decisions involving that question.

Specifically, like the court below, the Second Circuit recently held in *Robinson v. Metro-North Commuter Railroad*, 267 F.3d 147 (2d Cir. 2001), that, in light of the *Teamsters* framework, denial of certification for a "pattern-or-practice" claim was an abuse of discretion notwithstanding the district court's determination that "individualized determinations" regarding liability and damages "overwhelm[ed]" common issues. *Id.* at 157. The *Robinson* court held that the *Teamsters* multi-stage trial plan must be applied in assessing class certification and minimized the relevance of individual "evidence regarding specific instances of alleged discrimination." *Id.* at 168. The court noted that its decision contributed to a split of authority regarding the proper

application of *Teamsters* to class actions seeking legal relief in a jury setting, and expressly stated that it was rejecting the contrary "approach set out by the Fifth Circuit." *Id.* at 163-64 & n.8.

As *Robinson* noted, the Fifth Circuit has held that the *Teamsters* model has limited applicability to claims for legal relief in a jury trial, and that it certainly cannot be used to compel class certification by overriding the "individualized" nature of the underlying claims. For example, in *Smith v. Texaco, Inc.*, 263 F.3d 394 (5th Cir. 2001), in reversing a district court's certification of an employment discrimination "pattern or practice" class action, the Fifth Circuit held that applying *Teamsters* to require certification was improper, since the case "as a whole" must satisfy the certification requirements, and the need for "individualized proof" "would allow a class action to 'degenerate in practice into multiple lawsuits separately tried.'" *Id.* at 410-13, 418 (citation omitted). The *Smith* court further held that the multi-stage trial plan adopted there was fraught with constitutional problems:

> To meet the requirements of the Seventh Amendment, one jury may have to hear all the issues regarding the pattern and practice claim. This same jury would have to determine the quantum of [legal damages]. This would require an enormous amount of time, potentially empaneling a single jury for a one-year period.

Id. at 415 (internal citations omitted); *accord Castano v. Am. Tobacco Co.*, 84 F.3d 734, 750-51 (5th Cir. 1996); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 420 (5th Cir. 1998).

The decision below also conflicts with the Eleventh Circuit's decision in *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228 (2000), *cert. denied*, 121 S. Ct. 1354 (2001), where the court of appeals reversed a district court's decision certifying a class alleging company-wide discrimination

against Jewish customers. *See id.* at 1230-31. The Eleventh Circuit held that the "*Teamsters* framework is . . . inappropriate," *id.* at 1239, primarily because "the relief to which individual plaintiffs were entitled after a finding of a pattern or practice of discrimination in *Teamsters* (and in all subsequent cases employing the *Teamsters* rationale) was equitable in nature," while the *Rutstein* plaintiffs sought "legal relief." *Id.* Since such claims for legal relief require plaintiffs "to prove that they actually suffered some injury . . . [t]he idea that individual injury could be settled on a class-wide basis is preposterous." *Id.; see also Jackson v. Motel 6 Multipurpose Inc.*, 130 F.3d 999, 1006 (11th Cir. 1997) (holding certification improper because existence of "practice or policy of racial discrimination" necessarily "breaks down into an unmanageable variety of individual legal and factual issues").

Whether and under what circumstances the *Teamsters* multi-stage trial approach properly requires certification of juriable claims for legal relief has been raised by other courts, as well as by multiple commentators. *See, e.g., Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 896-99 (7th Cir. 1999) (noting difficulty with certifying "pattern-or-practice cases" that involve claims for "substantial money damages"); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 759 (4th Cir. 1998), *vacated on other grounds by* 527 U.S. 1031 (1999), *remanded to* 206 F.3d 431, *cert. denied*, 531 U.S. 822 (2000) (affirming denial of certification of pattern-or-practice case under *Teamsters* where plaintiffs sought legal relief and noting that "the Supreme Court has rejected the proposition that merely alleging a pattern or practice of discrimination automatically entitles plaintiffs to class certification."); Daniel F. Piar, *The Uncertain Future of Title VII Class Actions After the Civil Rights Act of 1991*, 2001 BYU L. Rev. 305, 314-15 (2001) (noting that "[t]he 1991 changes [providing for legal relief and jury trials] have also raised questions about the availability of the Teamsters-style bifurcation that had been used in declaratory or injunctive-based class actions in the past");

Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-the-Board Employment Discrimination Cases*, 15 Lab. Law. 415, 475-76 (2000) (noting the difficulty of applying the "Teamsters paradigm" to cases involving "damages and jury trial rights").

This issue cannot further await attention by this Court. After falling from approximately 1,000 class filings per year prior to this Court's decisions in *East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395 (1977), and *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982), to approximately 30 per year in the time between these decisions and the passage of the Civil Rights Act of 1991, "class action filings have dramatically increased to over 125 a year and [are] climbing . . . ." Charles S. Mishkind & V. Scott Kneese, *Big Risks and Opportunities, Class Actions and Pattern and Practice Cases*, 662 PLI/Lit 403, 414 (2001). Most, if not virtually all, of these employment discrimination class actions involve allegations of a pattern-or-practice of discrimination and seek application of the *Teamsters* bifurcated trial format. The stakes in such large class cases can be huge. *See Jefferson*, 195 F.3d at 897. Indeed, courts have granted Rule 23(f) review of these issues precisely because of their significance and the potential outcome-dispositive effect of the class issue. *See, e.g., Rutstein*, 211 F.3d at 1231; *Jefferson*, 195 F.3d at 897; *Carter v. West Publ'g Co.*, 225 F.3d 1258, 1260 (11th Cir. 2000). This Court's immediate review is especially important since this Court has never examined *Teamsters* in the ADEA or post-1991 Title VII contexts in which legal relief may be sought and awarded in a jury trial.

B. The Decision Below Is Severely Flawed And Reveals Further Subsidiary Judicial Conflicts

On the merits, the Tenth Circuit's requirement that, in addressing class certification, the *Teamsters* multi-stage trial approach must be applied to juriable claims for legal relief is

fundamentally flawed. Indeed, the various flaws expose further subsidiary judicial conflicts.

First, the Tenth Circuit erred in declaring that, to ensure that plaintiffs had a "procedural advantage" (Pet App. 42a), a *Teamsters* multi-stage trial structure was mandatory in making class certification decisions. *Teamsters* itself expressly noted that "not all class actions will necessarily follow [this] model." 431 U.S. at 360. Indeed, as the Fifth Circuit held in *Mooney*, "[a] 'pattern or practice' claim is not a separate cause of action, but merely another method by which disparate treatment can be shown." 54 F.3d at 1218. Thus, the Third Circuit held in *Lockart v. Westinghouse Credit Corp.*, 879 F.2d 43, 57 & n.15 (3d Cir. 1989), that a district court is not required to instruct a jury in accordance with the pattern-or-practice model established in *Teamsters*, even where plaintiffs allege a pattern-or-practice of discrimination. On the contrary, the multi-stage trial structure accepted in *Teamsters* is simply a case management technique for a suit seeking equitable relief from a court that is sitting as a single fact-finder in all stages of trial. As such, it is an imperfect and often inappropriate technique for managing private suits involving juriable claims for legal relief, where individualized issues more frequently arise, where there are more substantial limits on what a jury can reasonably be expected to obtain and absorb, and where bifurcation may result in different factfinders sitting in judgment on interrelated factual issues (such as whether particular employment actions were part of an alleged pattern or practice) without knowing the actual bases for the prior fact-finder's determinations (*e.g.*, about the extent, strength and/or contours of an alleged pattern or practice).

Second, requiring a multi-stage trial approach in the context of juriable claims for legal relief implicates constitutional issues that the Tenth Circuit did not even address but that the district court properly recognized could be fatal in these

circumstances. As the district court found (Pet. App. 76a, 123a-124a & n.22), imposing a multi-stage trial structure in this context would result in a jury being impaneled for an unduly long period of time and asked to absorb an unreasonable quantity of evidence concerning multiple parties and multiple claims in multiple stages, effectively depriving defendants of due process and a fair trial. *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993) ("The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's—and defendant's—cause not be lost in the shadow of a towering mass litigation.") (citation omitted). Moreover, in a jury trial setting, trying the pattern or practice claim separately from the individual claims that make up the alleged pattern may violate due process by creating "a sterile or laboratory atmosphere in which causation is parted from the reality of injury. . . ." *In re Beverly Hills Fire Litig.*, 695 F.2d 207, 217 (6th Cir. 1982); *see also Patterson v. Mobil Oil Corp.*, 841 F.3d 417, 419 (5th Cir. 2001); *Lusardi*, 118 F.R.D. at 370.

Furthermore, the prospect of multiple juries "in a series of individual trials" following an initial pattern or practice trial, as implicitly suggested by the Tenth Circuit (Pet. App. 40a & n.7), raises serious Seventh Amendment concerns. *See Miller v. Hygrade Food Prods. Inc.*, 198 F.R.D. 638, 644 (E.D. Pa. 2001) ("[I]t would be highly impractical to have one jury weigh all the evidence within the liability phase and then apply that presumption, if so found, to each of the potential 200 class members. On the other hand, this Court would run afoul of the . . . Seventh Amendment if it were to bifurcate issues to separate juries."). As the Fifth Circuit properly noted in *Smith*, separating equitable and legal claims or using different juries at different stages to resolve interrelated issues about the alleged pattern or practice and its potential victims would "necessarily run[] afoul of the Seventh Amendment," and avoiding that problem by calling for "one jury . . . to hear

all the issues . . . would require an enormous amount of time, potentially empaneling a single jury for a one year period." *Smith*, 263 F.3d at 415; *see also Jefferson*, 195 F.3d at 896-99; *Rhone-Poulenc Rorer*, 51 F.3d at 1303. Commentators concur that application of the "Teamsters approach of bifurcating liability and damages issues" "appears to be unconstitutional" in the jury trial context. Keith R. Fentonmiller, *Damages, Jury Trials and the Class Action Under the Civil Rights Act of 1991*, 12 Lab. Law. 421, 439-43 (1997); *see also* Piar, 2001 BYU L. Rev. at 314 (noting that applying the *Teamsters* bifurcated trial format "may violate the Seventh Amendment rights of the litigants").

Third, the Tenth Circuit's view that individualized issues largely relate only in the second and later stages of trial is unsupportable. Pet. App. 40a. As other courts of appeals have appropriately recognized, a defendant is not only entitled to raise such individualized issues at the *first* stage of a *Teamsters* class trial, but has a constitutional right to do so. *See, e.g., Ardrey v. United Parcel Serv.*, 798 F.2d 679, 683 (4th Cir. 1986) (holding that, when faced with a *Teamsters* pattern or practice claim, a defendant can respond by "articulat[ing] a nondiscriminatory, nonpretextual reason for *every* discharge") (emphasis in original); *Coates v. Johnson & Johnson*, 756 F.2d 524, 532 (7th Cir. 1985) (same); *Western Elec. Co. v. Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976) ("Western may attempt to rebut plaintiff's allegations of class-wide discrimination by showing that it was not guilty of discrimination in one or more instances which are alleged to fall within the pattern. . . . [T]o deny Western the right to present a full defense on the issues would violate due process."). Indeed, in *Teamsters* itself, the Court noted that statistics concerning whether a pattern or practice of discrimination exists are usefully supplemented with evidence of individual employment actions to bring "the cold numbers convincingly to life." 431 U.S. at 339. Again, to deny the defendant use of such proof is to deny due process of law. *See*

Lusardi, 118 F.R.D. at 370; *see also Blyden v. Mancusi*, 186 F.3d 252 (2d Cir. 1999); *Cimino v. Raymark Indus.*, 151 F.3d 287 (5th Cir. 1998).

Finally, the Tenth Circuit's view that use of a multi-stage trial approach renders the plethora of individualized issues concededly present in later stages of a pattern-or-practice case legally irrelevant to the decision to certify the first stage takes a myopic approach to case management and highlights another underlying judicial conflict. Like the Tenth Circuit here, the Second Circuit in *Robinson* held that the district court had "abused its discretion in not certifying the liability stage," without regard to the individualized issues in the later stages. 267 F.3d at 169. But the Fourth Circuit has properly held that "a trial judge cannot, in determining the manageability of a proposed class action, look exclusively to only one aspect of the case" and "must look to the case as a whole" because "the problem of proof of the individual claims and of the essential elements of individual injury and damages will remain . . . ." *Windham v. American Brands, Inc.*, 565 F.2d 59, 71 (4th Cir. 1977) (en banc). Similarly, in *Smith*, the Fifth Circuit rejected a compartmentalized approach and instead held that "the cause of action, as a whole," must meet class certification requirements. 263 F.3d at 409. And, in *Rutstein*, the Eleventh Circuit rejected certification of a "pattern-or-practice" phase because subsequent issues such as monetary relief "are necessarily capable of only individualized resolution." *Rutstein*, 211 F.3d at 1241; *see also Jackson*, 130 F.3d at 1005-07.

In short, the decision below is wrong and at odds with decisions of other courts at almost every conceivable level and in almost every conceivable way. It proposes a trial plan for class certification that, as the district court found, denies defendants a fair opportunity to explain their actions, is unmanageable, and raises serious constitutional questions. This Court's review is necessary.

III. THE TENTH CIRCUIT'S TIMELINESS RULINGS DEEPEN SPLITS OF JUDICIAL AUTHORITY ON IMPORTANT AND RECURRING ISSUES

The Tenth Circuit's timeliness rulings also deepen mature circuit splits on a third set of important and recurring statute of limitations issues. In the employment discrimination context, a claim is untimely if it is not raised in an EEOC charge within 300 days of the alleged discriminatory act. *See, e.g.*, 29 U.S.C. § 626(d)(2). Thiessen was aware as early as 1993 that he was on the alleged "blocker" list; he had contemporaneous notice of each adverse employment action of which he complains; and yet he did not file his charge until 1996. Pet. App. 86a. Nonetheless, the court below held that the 300-day limitation was not binding on Thiessen or the opt-in plaintiffs, relying on a "continuing violation" theory that has confused and been inconsistently applied in the lower courts. *See, e.g.*, 2 Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* 1351 (3d ed. 1996) (describing the "continuing violation" doctrine as "the most muddled area in all of employment discrimination law"); Ramona L. Paetzold & Anne M. O'Leary-Kelly, *Continuing Violations and Hostile Environment Sexual Harassment: When Is Enough, Enough?*, 31 Am. Bus. L.J. 365, 382 (1993) (calling the doctrine "one of the most confusing and inconsistently applied developments in employment discrimination law"). Review by this Court is necessary to provide essential guidance. Indeed, this Court has already recognized as much by granting certiorari in *National Railroad Passenger Corp. v. Morgan*, 121 S. Ct. 2547 (2001), which overlaps with aspects of the question presented here.

A. The Decision Below Broadens Three Splits Of Authority Among The Courts Of Appeals

First, there is a significant circuit split concerning whether the "continuing violation" doctrine is properly applied to resurrect a named plaintiff's untimely claims in the absence of

any basis for equitable tolling or otherwise excusing a failure to file an administrative charge of discrimination. Like the Tenth Circuit here, the First, Second, Third, Fourth, Sixth, Ninth and District of Columbia Circuits view the doctrine as "allow[ing] a plaintiff not only to allege otherwise time barred acts, but more concretely, to receive damages, such as back pay, based on and reaching back to those acts." *Provencher v. CVS Pharmacy*, 145 F.3d 5, 14 (1st Cir. 1998); *see also, e.g., Bonner v. Guccione*, 178 F.3d 581, 583-84 (2d Cir. 1999); *Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476, 481 (3d Cir. 1997), *Hull v. Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Educ.*, 926 F.2d 505, 511 (6th Cir. 1991); *Green v. Los Angeles Cnty. Super. of Sch.*, 883 F.2d 1472, 1475 (9th Cir. 1989); *Taylor v. Home Ins. Co.*, 777 F.2d 849, 856-57 (4th Cir. 1986); *Shehadeh v. Chesapeake & Potomac Tel. Co.*, 595 F.2d 711, 725 (D.C. Cir. 1978).

As it recently expressly acknowledged, the Eighth Circuit takes a directly conflicting view. *See Madison v. IBP, Inc.*, 257 F.3d 780, 796-97 & n.12 (8th Cir. 2001) ((noting different rule in "[o]ther circuits"); citing *Bonner*, 178 F.3d at 583-84; *Provencher*, 145 F.3d at 14; *Rush*, 113 F.3d at 481). Specifically, "[i]n the Eighth Circuit plaintiffs may only recover damages on their federal employment discrimination claims for acts committed during the statute of limitations period, even if there was a continuing violation." *Id.*

The Fifth Circuit follows the Eighth Circuit's approach. *See Perez v. Laredo Junior College*, 706 F.2d 731, 733-34 (5th Cir. 1983). As the *Perez* Court explained:

> If . . . the statutory violation does not occur at a single moment but in a series of separate acts and if the same alleged violation was committed at the time of each act, then the limitations period begins anew with each violation and only those violations preceding the filing of the complaint by the full limitations period are foreclosed. Similarly, if the statutory violation occurs as a result of a

> continuing policy, itself illegal, then the statute does not foreclose an action aimed at the company's enforcement of the policy within the limitations period.

706 F.2d at 733-34.

The importance of this conflict is demonstrated by this Court's grant of certiorari in *National Railroad*, 121 S. Ct. 2547. That case presents the question whether "a plaintiff who has knowingly allowed the statute of limitations to lapse on alleged violations of federal anti-discrimination statutes may nevertheless sue on such time-barred claims whenever incidents within the limitations period are 'sufficiently related' to the otherwise time-barred claims." The briefs filed in *National Railroad* debate at length the proper application, if any, of the "continuing violation" doctrine where, as here, a plaintiff alleges a "pattern" of allegedly discriminatory acts. Indeed, the Solicitor General's brief takes the position that the "continuing violation" doctrine can never be applied to resurrect stale claims, even if grounds exist to excuse the failure to file a timely charge. *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 22-26, *Nat'l R.R. Passenger Corp. v. Morgan*, No. 00-1614.

Second, wholly apart from and in addition to the application of the "continuing violation" doctrine in the individual plaintiff context, the Tenth Circuit's extension of the doctrine to permit the resurrection of *other plaintiffs'* stale claims for purposes of determining class membership presents a further compelling issue that is the subject of a split of authority among the courts of appeals.

With the decision below, the Tenth and Sixth Circuits permit even class members to assert stale claims "regardless of the statute of limitations because [the employer's] actions were part of a continuing violation." *Alexander v. Local 496*, 177 F.3d 394, 408-09 (6th Cir. 1999), *cert. denied*, 528 U.S. 1154 (2000); Pet. App. 48a. In direct contrast, the Third,

Fifth, Seventh, Ninth, and Eleventh Circuits do not apply the doctrine to "allow[] one plaintiff to revive a stale claim simply because the allegedly discriminatory policy still exists and is being enforced against others." *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1221 (11th Cir. 2001), *pet. for cert. filed*, (Nov. 13, 2001) (No. 01-726); *see also Domingo v. New England Fish Co.*, 727 F.2d 1429, 1443 (9th Cir. 1984); *Payne v. Travenol Labs., Inc.* 673 F.2d 798, 813 (5th Cir. 1982); *Movement for Opportunity & Equality v. Gen. Motors Corp.*, 622 F.2d 1235, 1248 (7th Cir. 1980); *Wetzel v. Liberty Mut. Life Ins. Co.*, 508 F.2d 239, 246 (3d Cir. 1975). Rather, these courts of appeals permit an "individual plaintiff [to] sue on otherwise time-barred claims as long as one act of discrimination has occurred *against that individual* during the statutory period." *Hipp*, 252 F.3d at 1221 (emphasis added).

As the *Hipp* court noted, most courts that interpret the "continuing violation" doctrine expansively still require that "some acts of discrimination against the individual [class] plaintiffs ha[ve] occurred within the statutory period," thus making "the earlier acts of discrimination . . . actionable because they were part of a continuing violation" against that individual plaintiff. *Id.* Thus, as the Ninth Circuit recognized in *Domingo*, 727 F.2d 1429, unless "each class member [were required to] demonstrate, by fact of employment or otherwise, that he or she had been discriminated against during the limitation period or was a member of a group exposed to discrimination during that time," application of the continuing violation doctrine "would effectively read the limitation period out of the [employment discrimination] statute[s] . . . ." *Id.* at 1443.

Third, the decision below permitted Thiessen and other opt-in plaintiffs to avail themselves of the continuing violation doctrine even though they suffered from discrete instances of alleged discrimination, such as terminations or failures to promote, as opposed, for example, to non-discrete

employment actions, such as ongoing sexual harassment. This decision—as it applies equally in both the individual and class contexts—is directly contrary to the decisions of the Second, Third, Fifth, Seventh, Eighth and District of Columbia Circuit Courts of Appeals, which have uniformly held that the "continuing violation" doctrine cannot apply where the alleged discrimination causes "a discrete event such as a lost job or a denied promotion" which would "trigger a duty of the plaintiff to assert his rights arising from that deprivation." *West v. Phila. Elec. Co.*, 45 F.3d 744, 756 (3d Cir. 1995); *accord Banas v. Am. Airlines*, 969 F.2d 477, 481 (7th Cir. 1992) ("When an employer acts in a discrete fashion, such as failing to hire or discharging a protected individual, this discrete action clearly triggers the running of the limitations period."); *see also Huckabay v. Moore*, 142 F.3d 233, 240 (5th Cir. 1998); *Gipson v. KAS Snacktime Co.*, 83 F.3d 225, 229 (8th Cir. 1996); *Miller v. Int'l Tel. & Tel. Corp.*, 755 F.2d 20, 25 (2d Cir. 1985); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 473 (D.C. Cir. 1976). Thus, the Tenth Circuit's decision also creates a conflict among the courts of appeals on this threshold issue, a factor further warranting this Court's review; indeed, this issue is also before the Court in *National Railroad*, 121 S. Ct. 2547.

B. Judicial Extension Of The Continuing Violation Doctrine Implicates Important And Recurring Questions Of Federal Law That Merit Review

This Court should not postpone review and resolution of these important statute of limitations issues. Application of the "continuing violation" doctrine is a critical issue in many of the thousands of employment discrimination cases filed annually, and the need to provide clarification to the lower courts in applying the "continuing violation" doctrine is plain in light of the Court's grant of certiorari in *National Railroad*, 121 S. Ct. 2547.

As this Court has recognized, employment discrimination "time limitations provisions themselves promote important interests," with "the period allowed for instituting suit inevitably reflect[ing] a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in favor of prohibiting the prosecution of stale ones." *Delaware State College v. Ricks*, 449 U.S. 250, 259-60 (1980); *see also Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975) (noting that a statute of limitations "reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of the stale ones"). The expansive interpretation of the continuing violation doctrine here is especially problematic since it permits employers, in a class action context, to be hauled into court to defend stale claims of discrimination for an indeterminate duration.

Accordingly, this Court's review is necessary to provide clear guidance regarding the lower courts' inconsistent development and application of the continuing violation doctrine. Although the decision below presents a unique opportunity to consider the propriety of applying the continuing violation doctrine in both the individual and class action settings, at the very least the Court should withhold decision of this case until it has decided *National Railroad*, 121 S. Ct. 2547.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STEVEN T. CATLETT
JONES, DAY, REAVIS & POGUE
77 West Wacker Drive
Chicago, IL 60601
(312) 782-3939

GLEN D. NAGER
(Counsel of Record)
LAWRENCE D. ROSENBERG
DOMINICK V. FREDA
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

Counsel for Petitioners

TABLE OF CONTENTS

	Page
Thiessen v. General Electric Capital Corp., 267 F.3d 1095 (10th Cir. 2001)	1a
Thiessen v. General Electric Capital Corp., 255 F.3d 1221 (10th Cir. 2001)	27a
Thiessen v. General Electric Capital Corp., 13 F. Supp. 2d 1131 (D. Kan. 1998)	52a
Thiessen v. General Electric Capital Corp., 996 F. Supp. 1071 (D. Kan. 1998)	98a
U. S. Constitution amend.V & VII	129a
29 U.S.C. §§ 621-634	130a
29 U.S.C. § 216	160a
Thiessen v. General Electric Capital Corp., First Amended Complaint	162a

**UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT.**

Gary A. THIESSEN, Plaintiff-Appellant,

v.

GENERAL ELECTRIC CAPITAL CORPORATION, doing business as GE Capital, and its representatives; Montgomery Ward Credit Services, Inc., formerly known as Monogram Retailer Credit Services, Inc., a subsidiary of General Electric Capital Corporation, and its representatives, Defendants-Appellees, American Association of Retired Persons; National Employment Lawyers Association; Equal Employment Advisory Council, Amici Curiae.

No. 98-3208.

Sept. 28, 2001.

Before BRISCOE, REAVLEY,* and MURPHY, Circuit Judges.

ORDER

Appellees' petition for rehearing is granted. Our opinion of July 3, 2001 is withdrawn and a revised opinion is filed with this order.

---

* The Honorable Thomas M. Reavley, Senior Circuit Judge, United States Court of Appeals, Fifth Circuit, sitting by designation.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the petition for rehearing en banc is denied.

OPINION

BRISCOE, Circuit Judge.

Plaintiff Gary Thiessen, an employee of defendants General Electric Capital Corporation (GE) and Montgomery Ward Credit Services, Inc., filed this putative class action under the Age Discrimination in Employment Act (ADEA) alleging that he and other similarly situated employees had been adversely affected by a pattern or practice of age discrimination on the part of defendants. Although the district court initially certified a class of twenty-three plaintiffs, it ultimately decertified the class, dismissed the opt-in plaintiffs, and granted summary judgment in favor of defendants with respect to Thiessen's individual claims. Thiessen now appeals claiming the district court erred in (1) decertifying the class and dismissing the opt-in plaintiffs, (2) granting summary judgment in favor of defendants with respect to his individual claims of age discrimination, (3) refusing to allow eight proposed plaintiffs to join the class, and (4) refusing to allow him to depose defendants' corporate counsel. We exercise jurisdiction pursuant to 28 U.S.C. § 1291, and reverse and remand for further proceedings.

I.

GE is the parent company of General Electric Capital Services (GECS), which in turn owns General Electric Capital Credit (GECC). Within GECC is the Retail Financial Services unit (RFS). In 1989, GECC purchased Monogram Retail Credit Services, Inc. (MRCSI), which had been the credit division of retailer Montgomery Ward. MRCSI became a

subsidiary of the RFS unit after the acquisition, and in 1997, it was renamed Montgomery Ward Credit Services, Inc.[1]

Thiessen, who was born on March 7, 1947, began working as a credit manager trainee for MRCSI in 1968. From 1972 to mid-1994, he held various management positions within MRCSI and progressed to Band 4 on the company's five-band pay-grade scale. Between May 1994 and August 1996, Thiessen was placed on "special assignments" and assisted in the construction of MRCSI facilities in Kansas, Illinois, and Georgia. At the completion of those projects, Thiessen transferred to MRCSI's Las Vegas facility and assumed his current position as Band 4 collection manager. According to statements in the record, Thiessen's position at the Las Vegas facility was to "be eliminated as of May 30, 1998," and Thiessen allegedly was not "allowed to post for any other positions within GE." Aplt.App. 3 at 2.

On February 5, 1996, Thiessen filed a charge of discrimination with the Kansas Human Rights Commission and the Equal Employment Opportunity Commission (EEOC). He alleged that defendants had "an express but covert 'White Blockers' or 'Blockers' policy of discriminating against older white employees . . . by forcing [them] into early retirement or by eliminating [their] . . . position[s] through restructuring." *Id.* at Tab C. He further alleged that defendants exercised this "pattern and practice of employment decisions motivated by age and/or race and related factors" against him. *Id.* Specifically, Thiessen alleged he was repeatedly denied promotions because of his age and race. He subsequently filed this action alleging, in pertinent part, that defendants committed willful violations of the ADEA by denying him various promotions and placing him on "special

---

[1] Because the bulk of relevant events in this case occurred prior to 1997, the opinion will refer primarily to MRCSI.

assignments."[2] Appee. Supp. App. II at 003. Thiessen further alleged in his complaint that defendants undertook a pattern or practice of systematically discriminating against older employees.

The centerpiece of both Thiessen's individual claims of age discrimination and his claims of class-wide discrimination was a "blocker policy" allegedly adopted and implemented by defendants in the early 1990s. According to Thiessen, in 1991, "GECC management began referring to the older [executive] employees as 'blockers,' because in their view these employees were 'blocking' the advancement of younger, newly recruited employees," in particular those younger employees who were participants in defendants' Management Development Program (MDP). *Id.* at 004. On March 2, 1992, Dave Ekedahl, a vice-president at RFS, and David Ferreira, vice-president of human resources for GECC, sent a memorandum to Steve Joyce, the then president and CEO of MRCSI, and Jeff Faucette, vice-president of human resources for MRCSI, asking, "What are plans to upgrade executive talent . . . remove blockers." Appee. Supp. App. I at 119. In response to this memo, Faucette directed his subordinates to prepare severance worksheets and retirement packages for various MRCSI employees over the age of forty, including Thiessen and several of the opt-in plaintiffs (Lawson, Gwen Colwell, Bob Demartine, Melva Heid, and Bob Marsonette) none of whom had requested such packages. On March 1, 1993, Ferreira circulated a memo to Faucette and others again discussing the subject of "blockers." Joyce and Faucette allegedly gave a presentation discussing Band 4 Blockers at a 1993 leadership review meeting attended by Ferreira. At a May 1993 meeting of MRCSI human resource managers, the concept of "blockers" was again discussed and outlined by Faucette. At a June 18, 1993, meeting at MRCSI's Merriam,

---

[2] Although Thiessen's complaint also included a claim under Title VII for reverse race discrimination, he has since abandoned that claim.

Kansas facility, Faucette distributed a list of possible blockers to the human resource managers. The managers were effectively instructed to discuss the blocker policy with their respective operational managers, and assist the operational managers in identifying blockers and carrying out the policy. Ultimately, Thiessen alleges, the operational managers implemented the "blocker policy" by taking various negative employment actions (e.g., negative performance evaluations, demotions, terminations, reductions in force, placement on "special projects," etc.) toward older employees identified as blockers.

Thiessen alleged defendants' "blocker policy" impacted all of the opt-in plaintiffs, each of whom allegedly suffered some type of adverse employment action. On an individual level, Thiessen alleged he was identified by defendants as a blocker, and he was (1) denied a business center manager position in Las Vegas in 1993, (2) phased out of his position as National Attorney-Agency manager in 1994 and placed on "special assignment," (3) downgraded on his 1993 and 1994 performance reviews, and (4) denied two remittance processing manager positions in 1995.

Defendants denied having any pattern or practice of discrimination. Although they acknowledged there had been some discussion among certain employees of blockers, they denied that any type of "blocker policy" was implemented anywhere in the organization. Further, defendants alleged that in the fall of 1994, Gail Lanik, the CEO of MRCSI and successor to Steve Joyce expressly repudiated the notion that employment decisions were based on any "blocker policy." In response to defendants' denials, Thiessen alleged that, notwithstanding Lanik's purported repudiation, the "blocker policy" continued to be used on a covert basis. In support of his allegation, Thiessen pointed to alleged acts of employment discrimination against him and the other proposed plaintiffs after the fall of 1994. Thiessen also pointed to statistical

evidence that allegedly demonstrated older workers were treated less favorably than younger employees.

During the course of discovery, the district court conditionally certified a class of twenty-three plaintiffs (Thiessen and twenty-two opt-in plaintiffs). *Thiessen v. General Elec. Capital Corp.*, 996 F. Supp. 1071, 1083 (D. Kan. 1998) (*Thiessen I*). In doing so, the district court noted:

> Mr. Thiessen has not simply averred the existence of a discriminatory policy or merely argued that circumstantially one should infer its existence by virtue of numerous people in the protected category having incurred adverse employment actions. Instead, he has come forward with direct evidence of an overall policy of purported age discrimination. Moreover, the names of some of the opt-in plaintiffs appear on "blocker" lists. The court believes this evidence cannot be so easily discounted just because the alleged discrimination was meted out "over a wide geographic range in a number of ways" and that it merits a threshold determination that the opt-in plaintiffs are "similarly situated" to Mr. Thiessen for purposes of something akin to conditional certification. However, the court remains troubled by a puzzling lack of any significant showing by Mr. Thiessen that there is a link between this alleged policy and the adverse job actions. Even if there was a discriminatory policy, the opt-in plaintiffs are only "similarly situated" if they can make a submissible case that they, too, were victims of it. It is because of that deficiency, at least in part, that the court is unwilling to grant final certification on the record before it.

Id. The court cautioned Thiessen that, "[i]n order to survive a motion to decertify," he would "need to set forth what he deem[ed] to be the specific link between the blocker policy and what occurred with each opt-in plaintiff." *Id.* Further, the court noted that if, in a subsequent motion to decertify, defendants could "truly convince the court that individual

[defense] issues would predominate at trial, the contention that the opt-in plaintiffs [we]re similarly situated would likely be largely eviscerated." *Id.* at 1084. Finally, the court noted it would make a final determination regarding whether the trial of all the opt-in plaintiffs' claims could be coherently managed and presented "in a manner that w[ould] not confuse the jury or unduly prejudice any party." *Id.*

At the conclusion of discovery, defendants moved to decertify the class. Defendants also moved for summary judgment with respect to each of the twenty-three plaintiffs. The district court decertified the class, dismissed the opt- in plaintiffs' claims without prejudice, and granted summary judgment in favor of defendants with respect to Thiessen's individual claims of discrimination. *Thiessen v. General Elec. Capital Corp.*, 13 F. Supp. 2d 1131 (D. KAN. 1998) (*Thiessen II*).

II.

Decertification of plaintiff class and dismissal of opt-in plaintiffs

Thiessen contends the district court erred in decertifying the plaintiff class and dismissing the opt-in plaintiffs' claims without prejudice. We review for abuse of discretion a district court's decision to certify or decertify a class under the ADEA. *See Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213 (5th Cir. 1995); *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 51-52 (3d Cir. 1989). Under an abuse of discretion standard, we will not disturb the underlying decision unless we have a definite and firm conviction that the district court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances. *See Richardson v. Missouri Pacific R.R. Co.*, 186 F.3d 1273, 1276 (10th Cir. 1999).

Class actions under the ADEA are authorized by 29 U.S.C. § 626(b), which expressly borrows the opt-in class action

mechanism of the Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b) (1994). Section 216(b) provides for a class action[3] where the complaining employees are "similarly situated." Unlike class actions under Rule 23, "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." *Id.*

The overriding question here is whether Thiessen and the twenty-two opt-in plaintiffs are "similarly situated" for purposes of § 216(b). Unfortunately, § 216(b) does not define the term "similarly situated," and there is little circuit law on the subject. Federal district courts have adopted or discussed at least three approaches to determining whether plaintiffs are "similarly situated" for purposes of § 216(b). *See, e.g., Mooney,* 54 F.3d at 1213 (discussing two different approaches adopted by district courts); *Bayles v. American Med. Response of Colo., Inc.,* 950 F. Supp. 1053, 1058 (D. Colo. 1996). Under the first approach, a court determines, on an *ad hoc* case-by-case basis, whether plaintiffs are "similarly situated." *Mooney,* 54 F.3d at 1213. In utilizing this approach, a court typically makes an initial "notice stage" determination of whether plaintiffs are "similarly situated." *Vaszlavik v. Storage Tech. Corp.,* 175 F.R.D. 672, 678 (D. Colo. 1997). In doing so, a court "'require[s] nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan.'" *Id.* (quoting *Bayles,* 950 F. Supp. at 1066). At the conclusion of discovery (often prompted by a motion to decertify), the court then makes a second determination, utilizing a stricter standard of "similarly situated." *Id.* at 678. During this "second stage"

---

[3] "Of course, this is not a true Rule 23 class action." *Kelly v. Alamo,* 964 F.2d 747, 747 n.1 (8th Cir. 1992). "Many courts and commentators, however, have used the vernacular of the Rule 23 class action for simplification and ease of understanding when discussing representative cases brought pursuant to § 16(b) of the FLSA." *Id.*

analysis, a court reviews several factors, including "(1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant which appear to be individual to each plaintiff; (3) fairness and procedural considerations; and (4) whether plaintiffs made the filings required by the ADEA before instituting suit." *Id.*[4]

Under the second approach, district courts have incorporated into § 216(b) the requirements of current Federal Rule of Civil Procedure 23. *See Bayles,* 950 F. Supp. at 1060-61 (discussing cases adopting this approach). For example, in *Shush an v. Univ. of Colo.,* 132 F.R.D. 263 (D. Colo. 1990), the district court concluded "that Rule 23(a)'s four prerequisites [numerosity, commonality, typicality, and adequacy of representation] and 23(b)(3)'s requirement that common questions of fact predominate should be used to determine whether plaintiffs are similarly situated." *Bayles,* 950 F. Supp. at 1061 (describing *Shush an* holding).

In a third approach, district courts have suggested incorporating into § 216(b) the requirements of the pre 1966 version of Rule 23, which allowed for "spurious" class actions. *See Bayles,* 950 F. Supp. at 1064 (holding that, because Advisory Committee Notes to the 1966 amendments make clear that the amendments were not intended to affect § 216(b) actions, "if Rule 23's standards apply . . . at all, it must be through Rule 23 as it existed prior to 1966"). Under the pre 1966 version of Rule 23, the "character of the right sought to be enforced for" the class of plaintiffs must be "several," there must be "a common question of law or fact affecting the several rights," and "a common relief" must be sought. *Id.* Further, under the old Rule 23, district courts "had inherent authority to refuse to proceed collectively where it

---

[4] We note that the Eleventh Circuit recently endorsed this "two-tiered" approach to certification of § 216(b) opt-in classes. *See Hipp v. Liberty Nat'l Life Ins. Co.,* 252 F.3d 1208 (11th Cir. 2001).

would waste judicial resources or unfairly prejudice the party opposing the proposed class." *Id.* at 1065.

In the present case, the district court adopted the *ad hoc* approach to determining whether the plaintiffs were "similarly situated" for purposes of § 216(b). It first conditionally certified the class during the course of discovery, applying a fairly lenient standard for what constituted "similarly situated." During its second-stage analysis (prompted by the defendants' motion to decertify), the court applied a stricter standard, focusing on three factors: "(1) whether a sufficient link existed between the alleged blocker policy and the challenged employment decisions; (2) whether individual issues would predominate at trial; and (3) whether a trial of the action could be coherently managed and evidence presented in a manner that would not confuse the jury or unduly prejudice any party." *Thiessen II,* 13 F. Supp. 2d at 1136. Ultimately, the district court concluded that all three factors warranted decertifying the class.

With respect to the first factor, the district court concluded "the mere fact that plaintiffs suffered adverse employment actions after having been designated as 'blockers,' standing alone, [wa]s insufficient to support an inference that a causal connection exist[ed] between the blocker policy and the adverse actions, particularly in light of the significant time lag and critical intervening events." *Id.* at 1140. The "significant time lag" was the time period between the plaintiffs' alleged designations as "blockers" in 1993 and the filing of Thiessen's EEOC charge in February 1996, which the district court concluded allowed Thiessen and the other opt-in plaintiffs to reach back 300 days from the charge, or until approximately April 11, 1995. The "critical intervening events" included the express repudiation of the "blocker policy" by MRCSI CEO

Gail Lanik in the fall of 1994.[5] Because there was insufficient evidence of a "causal link between the blocker policy or plaintiffs' purported blocker status and the challenged employment actions," the district court stated it could not "conclude that the plaintiffs [we]re similarly situated for purposes of proceeding as a collective action." *Id.* at 1141.

In conducting its analysis of the first factor, the district court also rejected the suggestion forwarded by Thiessen that it should apply a summary judgment-type standard in determining whether, for purposes of the "similarly situated" analysis, there was a sufficient link between the blocker policy and the adverse employment actions taken against plaintiffs. Instead, the court concluded that whether plaintiffs were "similarly situated" was a factual determination it was entitled to make based on the evidence presented by the parties.

With respect to the second factor, the district court noted that defendants had come forward with "highly individualized" defenses with regard to each of the various adverse employment actions alleged by plaintiffs. *Id.* at 1142. Allowing defendants to assert these defenses during a

---

[5] Shortly after Lanik assumed the reins as CEO of MRCSI, she terminated employee Rick Richards, an older, white executive who had worked for the company for years and who had allegedly been classified as a "blocker" in 1993. Following his discharge, Richards filed an EEOC charge of age discrimination (it is unclear from the record whether he also filed a lawsuit). Defendants' legal department responded to the charge by investigating the origination and implementation of the blocker policy and, according to plaintiffs, by purging company files of documents pertaining to the policy. Ultimately, defendants settled with Richards regarding his claim of discrimination. Following these events, defendants' counsel advised Lanik that she should expressly repudiate the blocker policy. Lanik did so in the fall of 1994; more specifically, in a series of meetings that included most of defendants' employees, Lanik stated there was no blocker policy and that employment decisions were to be made on the basis of merit. Plaintiffs allege that, notwithstanding this purported repudiation, defendants continued to maintain and apply the blocker policy.

collective trial, the court concluded, would effectively result in "23 individual jury trials to determine defendants' liability to each plaintiff." *Id.* at 1143. Although the court acknowledged the "common thread" of the blocker policy, it nevertheless concluded that "the judicial inefficiencies" associated with resolving "what appear[ed] to be 23 distinct cases" clearly outweighed "any potential benefits in proceeding as a collective action." *Id.*

With respect to the third factor, the district court noted that plaintiffs had proposed separating the trial into two phases. Plaintiffs proposed that during the first phase of the trial the court "would submit the pattern and practice allegations as well as the individual claims and damages of nine plaintiffs [seven of whom appeared on various lists of proposed blockers, and two of whom were told they were blockers]." *Id.* According to plaintiffs, this initial phase would "involve a determination of common class issues relating to the existence, implementation, and discriminatory nature of the Blocker Policy as well as class issues regarding wilfulness under the ADEA." *Id.* "If the jury determined that the blocker policy existed and that defendants had engaged in a pattern and practice of age discrimination, according to plaintiffs' proposed plan, then the same jury would . . . hear Phase Two of the trial, which would involve the remaining 14 plaintiffs." *Id.* at 1143-44.

The district court concluded that plaintiffs' proposed trial plan had "numerous, serious deficiencies." *Id.* at 1144. In particular, the court concluded that plaintiffs' plan "render[ed] individualized consideration of the claims impossible and impose[d] extraordinary burdens on the jury, both in terms of the quantity of evidence and the length of trial." *Id.* Thus, the court stated that "the absence of any workable trial management plan . . . reinforce[d]" its decision to decertify the class. *Id.*

The initial question, which we address de novo, is whether it was proper for the district court to adopt the *ad hoc* approach in determining whether plaintiffs were "similarly situated" for purposes of § 216(b). *See Mooney*, 54 F.3d at 1213 (applying a de novo standard of review in determining whether district court applied the proper legal standard in decertifying a class). Arguably, the *ad hoc* approach is the best of the three approaches outlined because it is not tied to the Rule 23 standards. Congress clearly chose not to have the Rule 23 standards apply to class actions under the ADEA, and instead adopted the "similarly situated" standard. To now interpret this "similarly situated" standard by simply incorporating the requirements of Rule 23 (either the current version or the pre 1966 version) would effectively ignore Congress' directive.[6] That said, however, there is little difference in the various approaches. All approaches allow for consideration of the same or similar factors, and generally provide a district court with discretion to deny certification for trial management reasons. We find no error on the part of the district court in adopting the *ad hoc* approach.

Turning to the merits of Thiessen's arguments, the question is whether the district court abused its discretion in applying the *ad hoc* approach and decertifying the class. If plaintiffs were simply attempting to collectively assert their individual claims of discrimination, the decision to decertify would appear to be entirely proper. The problem, however, is that plaintiffs were asserting a pattern-or-practice claim modeled on *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). In particular, plaintiffs alleged that

---

[6] The Eleventh Circuit has apparently rejected the notion of relying on the Rule 23 requirements in deciding whether plaintiffs are "similarly situated" for purposes of § 216(b). *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 n.12 (11th Cir. 1996) ("it is clear that the requirements for pursuing a § 216(b) class action are independent of, and unrelated to, the requirements for class action under Rule 23 of the Federal Rules of Civil Procedure").

defendants, by way of the MDP and the blocker policy, had a company-wide policy of age discrimination. Stated differently, plaintiffs alleged that it was defendants' standard operating procedure, implemented through the MDP and the blocker policy, to discriminate against employees (particularly executive employees) on the basis of age. Although the district court acknowledged that all of the plaintiffs relied on the existence of the "blocker policy" to support their claims, it failed to recognize the pattern-or-practice nature of the class claim. For the reasons discussed below, we conclude the district court's failure in this regard adversely impacted its "similarly situated" analysis and resulted in an abuse of discretion.

Pattern-or-practice cases differ significantly from the far more common cases involving one or more claims of individualized discrimination. In a case involving individual claims of discrimination, the focus is on the reason(s) for the particular employment decisions at issue. *Cooper v. Fed. Reserve Bank of Richmond,* 467 U.S. 867, 876 (1984). In contrast, the initial focus in a pattern-or-practice case is not on individual employment decisions, "but on a pattern of discriminatory decisionmaking." *Id.* Thus, the order and allocation of proof, as well as the overall nature of the trial proceedings, in a pattern-or-practice case differ dramatically from a case involving only individual claims of discrimination. *Teamsters,* 431 U.S. at 357-62.

Pattern-or-practice cases are typically tried in two or more stages. During the first stage of trial, the plaintiffs' "burden is to demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer or group of employers." *Id.* at 360. Thus, "[a]t the initial, 'liability' stage of a pattern-or-practice suit the [plaintiffs are] not required to offer evidence that each person for whom [they] will ultimately seek relief was a victim of the employer's discriminatory policy." *Id.* Instead, plaintiffs' "burden is to establish that such a policy existed." *Id.* "The burden then

shifts to the employer to defeat the prima facie showing of a pattern or practice by demonstrating that the [plaintiffs'] proof is either inaccurate or insignificant." *Id.* "If an employer fails to rebut the inference that arises from the [plaintiffs'] prima facie case," the finder of fact can conclude "that a violation has occurred" and the trial court can award prospective equitable relief. *Id.* at 361. If the plaintiffs also seek "individual relief for the victims of the discriminatory practice," the case moves into the second or subsequent stages. *Id.* In these additional proceedings,[7] it must be determined whether each individual plaintiff was a victim of the discriminatory practice. Importantly, by having prevailed in the first stage of trial, the individual plaintiffs reap a significant advantage for purposes of the second stage: they are entitled to a presumption that the employer had discriminated against them. *See Cooper*, 467 U.S. at 875.[8]

Returning to the district court's decision to decertify, we conclude the district court erred in its determination of "whether a sufficient link existed between the alleged blocker policy and the challenged employment decisions," *Thiessen II*, 13 F. Supp. 2d at 1136. Given the pattern-or-practice nature of plaintiffs' claim, this factor necessarily encompasses factual issues relevant to both the first and second stages of trial, e.g., whether the blocker policy continued after Lanik's alleged

---

[7] "The second stage of a pattern and practice claim is essentially a series of individual lawsuits, except that there is a shift of the burden of proof in the plaintiffs' favor." *Newberg on Class Actions* § 4.17 (3d ed. 1992).

[8] If the plaintiffs do not prevail during the first stage of a pattern-or-practice trial, they are nevertheless entitled to proceed on their individual claims of discrimination. *See Cooper*, 467 U.S. at 878 ("It could not be more plain that the rejection of a claim of classwide discrimination does not warrant the conclusion that no member of the class could have a valid individual claim."). Naturally, however, they are left to proceed under the normal *McDonnell Douglas* framework, rather than benefitting from a presumption of discrimination. *Id.* at 880.

repudiation and, if it did, whether a link existed between that policy and the individual employment decisions affecting the named plaintiffs. The problem is that the district court effectively made findings regarding these issues in the guise of determining whether plaintiffs were "similarly situated." *See Adamson v. Bowen,* 855 F.2d 668, 676 (10th Cir. 1988) (holding that district court, in making class certification decision, should avoid focusing on merits of underlying class action); *Anderson v. City of Albuquerque,* 690 F.2d 796, 799 (10th Cir. 1982) (reversing and remanding denial of class certification where district court indicated its belief that plaintiff could not prevail on individual claims). By doing so, the district court essentially deprived plaintiffs of their right to have the issues decided by a jury, or to at least have the court determine, under summary judgment standards, whether there was sufficient evidence to send the issue to the jury. Further, the district court failed to take into account the fact that, if plaintiffs were able to establish a pattern or practice of discrimination, they would be entitled to a presumption that the individual employment actions taken against them were the result of such discrimination. Indeed, the district court effectively deprived plaintiffs of this procedural advantage as well.

The district court's consideration of the second factor (whether individual issues would predominate at trial), was likewise adversely affected by its failure to recognize that plaintiffs were proceeding under a pattern-or-practice theory. Although it is true that defendants asserted "highly individualized" defenses to each of the instances of individual discrimination asserted by plaintiffs, those defenses would not become the focal point until the second stage of trial and could be dealt with in a series of individual trials, if necessary. With respect to the first stage of trial and the initial issues of whether they had in place a pattern or practice of discrimination and whether it continued after the fall of 1994, defendants had only a few common defenses. Specifically,

defendants alleged that the blocker policy, though perhaps mentioned by Faucette at various times, was never implemented anywhere in the organization and was expressly repudiated by Lanik. Further, with respect to the discriminatory nature of the MDP program, defendants claimed it was open to all employees, including those over age forty. Thus, the presence of the "highly individualized" defenses clearly did not, as the district court concluded, outweigh "any potential benefits in proceeding as a collective action." As previously noted, there was a significant procedural advantage for plaintiffs to proceed in a collective action: if they prevailed in the first stage of trial, they would be entitled to a presumption of discrimination in subsequent proceedings to decide the merits of their individual claims. By bowing to the individualized defenses relevant only to the second stage of trial, the district court deprived plaintiffs of this opportunity.

The district court's consideration of the third factor (trial management concerns) was also adversely affected by its failure to recognize the pattern-or-practice nature of plaintiffs' claim. Most notably, the district court failed to acknowledge that plaintiffs' proposed trial plan, though perhaps deficient in some respects, was consistent with the framework outlined in *Teamsters* for pattern-or-practice claims. The court also failed to make any effort to modify the plaintiffs' proposed trial plan. Finally, the district court was wrong in concluding that trying the case in two phases, as suggested by plaintiffs, "render[ed] individualized consideration of the claims impossible." *Thiessen II,* 13 F. Supp. 2d at 1143.

We conclude the district court abused its discretion in decertifying the class. Taking into consideration the "pattern or practice" nature of plaintiffs' lawsuit, as discussed above, plaintiffs were, in fact, "similarly situated" for purposes of § 216(b). In particular, many of the plaintiffs were specifically listed or classified by defendants as "blockers" and suffered adverse employment consequences during the

relevant time period. The remainder of the plaintiffs, though never specifically classified by defendants as "blockers," fell within the alleged definition of "blockers" and were likewise subjected to adverse employment consequences during the relevant time period.

A district court considering a motion to certify [or decertify] is entitled to look past the pleadings and examine the evidence produced during discovery, but when an ADEA plaintiff relies upon a "pattern or practice" theory and comes forward with legitimate evidence to support that theory, the district court must take into account the framework for pattern-or-practice cases outlined by the Supreme Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). That did not occur in this case, and hence our application of those factors using the correct legal framework. We do not hold that whenever there is evidence of a pattern-or-practice, a class must be certified. Whether certification or decertification is appropriate depends upon application of the factors we have identified in the ad hoc approach.

Grant of summary judgment

In connection with their motion to decertify, defendants moved for summary judgment with respect to all of Thiessen's claims for relief. After granting defendants' motion to decertify, the district court granted defendants' summary judgment motion in its entirety. In doing so, the court treated Thiessen's claims as non-class, individual claims of discrimination. The court concluded that "three of Mr. Thiessen's claims, (i.e., his 1993 failure-to-promote claim; his 'phase-out' claim); and his downgraded performance claim" were time barred because they occurred more than 300 days prior to the filing of Thiessen's EEOC charge. *Thiessen II*, 13 F. Supp. 2d at 1147. As for the remaining two claims (the denial of the two 1995 RPC manager positions), the district court concluded, after analyzing them under the

McDonnell Douglas framework that Thiessen had "failed to produce evidence from which a reasonable factfinder could conclude that defendants' proffered explanations for [their] actions were 'unworthy of credence.'" *Id.* at 1149.

On appeal, Thiessen contends the district court erred in granting summary judgment in favor of defendants. We review the district court's grant of summary judgment de novo. *Kidd v. Taos Ski Valley, Inc.*, 88 F.3d 848, 851 (10th Cir. 1996). Summary judgment is proper only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). We view the evidence and all reasonable inferences derived therefrom in the light most favorable to the nonmoving party. *Kidd*, 88 F.3d at 851.

As with defendants' motion to decertify, proper consideration of defendants' motion for summary judgment must take into account the fact that Thiessen and the opt-in plaintiffs were asserting a pattern-or-practice claim. Although there is little case authority discussing summary judgment motions in pattern-or-practice cases, we see no reason why summary judgment motions cannot be aimed at both the first and second stage issues. Presumably, however, such motions must be analyzed in light of the orders of proof peculiar to pattern-or-practice cases, and must be filed and considered at an appropriate stage of the proceedings. During the first stage of a pattern-or-practice case, for example, a summary judgment motion (whether filed by plaintiffs or defendants) must focus solely on whether there is sufficient evidence demonstrating that defendants had in place a pattern or practice of discrimination during the relevant limitations

period.[9] *See Teamsters*, 431 U.S. at 357-61. Until the first stage is resolved, we question whether it is proper for a court to consider summary judgment motions regarding second stage issues (i.e., whether individual plaintiffs are entitled to relief). Even assuming, *arguendo*, such motions can properly be considered prior to resolution of the first stage, it is clear they would not be analyzed under the typical *McDonnell-Douglas* framework. *See id.* (rejecting use of *McDonnell-Douglas* framework in pattern-or-pattern cases); *see also Davoll v. Webb*, 194 F.3d 1116, 1147 (10th Cir. 1999) (discussing *Teamster's* rejection of the *McDonnell-Douglas* test in pattern-or-practice cases). Instead, they would operate under the presumption that (1) defendants had in place a pattern or practice of discrimination, and (2) all employment decisions regarding the class plaintiffs were made pursuant to that pattern or practice. *See Teamsters*, 431 U.S. at 362.

We conclude the district court erred in granting summary judgment in favor of defendants with respect to Thiessen's claims for relief. Consistent with our discussion of the class decertification decision, it is apparent that the first stage issues

---

[9] We note that the outcome of the first stage will essentially resolve the question of whether plaintiffs can properly rely on the "continuing violation" doctrine and seek relief for alleged acts of discrimination occurring more than 300 days prior to the filing of Thiessen's EEOC charge. *See Purrington v. Univ. of Utah*, 996 F.2d 1025, 1028 (10th Cir. 1993) (indicating plaintiffs can invoke continuing violation doctrine by demonstrating "the maintenance of a company-wide policy of discrimination both before and during the limitations period"); *see also Morgan v. National R.R. Passenger Corp.*, 232 F.3d 1008, 1015-16 (9th Cir. 2000) ("The second way to establish a continuing violation is to show a systematic policy or practice of discrimination that operated, in part, within the limitations period—a systemic violation."); *Lawton v. State Mut. Life Assur. Co. of Am.*, 101 F.3d 218, 222 (1st Cir. 1996) (noting that systemic violation has its roots in discriminatory policy or practice, and, so long as policy or practice itself continues into limitation period, challenger may be deemed to have filed timely complaint under continuing violation theory).

in this pattern-or-practice case have yet to be resolved. Thus, Thiessen's claims cannot at this point be treated as non-class claims of individual discrimination or analyzed under the *McDonnell Douglas* framework.

Refusal to allow certain plaintiffs to join class

When it initially certified the plaintiff class during discovery, the district court addressed several issues, including whether the proposed opt-in plaintiffs, none of whom filed EEOC charges, could piggyback on the EEOC charge filed by Thiessen.[10] The district court first concluded that Thiessen's EEOC charge asserted allegations of class-wide discrimination and satisfied the notice requirements of 29 U.S.C. § 626(d). The district court then concluded that only "those individuals who could have filed timely EEOC charges at the time Mr. Thiessen actually filed his charge" could join as opt-in plaintiffs. More specifically, the court concluded that only those individuals who suffered adverse employment actions in the 300-day period prior to the filing of Thiessen's EEOC charge could opt in. Accordingly, the district court excluded from the class eight proposed opt-in plaintiffs, seven of whom "resigned or were terminated from employment long before the start of the 300 day filing period," and one of whom "failed to allege any discriminatory treatment in the 300-day filing window." *Thiessen I*, 996 F. Supp. at 1078.

On appeal, Thiessen contends the district court erred in excluding these eight individuals from the opt-in class. According to Thiessen, the district court failed to consider evidence that defendants actively concealed the existence of

---

[10] Normally, "[a] person who believes that he has been the victim of age discrimination must file a charge with the EEOC within 180 days of the adverse employment decision . . . if he is in a 'non-deferral state,' 29 U.S.C. § 626(d)(1); and within 300 days of the employer's wrongful conduct if he is in a 'deferral state,' 29 U.S.C. § 626(d)(2)." *Grayson*, 79 F.3d at 1100.

the blocker policy. This evidence, Thiessen suggests, should have equitably tolled the time period for filing EEOC charges based on the blocker policy, and should have allowed all the proposed plaintiffs to opt in to the class. As previously noted, we apply an abuse of discretion standard in reviewing a district court's decision to certify a class. *Mooney*, 54 F.3d at 1213.

Federal courts "'universally hold that an individual who has not filed an administrative charge can opt-in to a suit filed by any similarly situated plaintiff under certain conditions.'" *Mooney*, 54 F.3d at 1223 (quoting *Anson v. Univ. of Tex. Health Sci. Ctr.*, 962 F.2d 539, 540 (5th Cir. 1992)); *see Mistretta v. Sandia Corp.*, 639 F.2d 588, 594-95 (10th Cir. 1980) (adopting single-filing rule in ADEA action). "This so-called 'single-filing rule' generally allows a plaintiff, who did not file an EEOC charge, to piggyback on the EEOC complaint filed by another person who is similarly situated." *Mooney*, 54 F.3d at 1223; *see Gitlitz v. Compagnie Nationale Air France*, 129 F.3d 554, 558 (11th Cir. 1997) ("A plaintiff who has not filed an individual EEOC charge may invoke the single-filing rule where such plaintiff is similarly situated to the person who actually filed an EEOC charge, and where the EEOC charge actually filed gave the employer notice of the collective or class-wide nature of the charge."). "The policy behind the single filing rule is that '[i]t would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC.'" *Mooney*, 54 F.3d at 1223 (quoting *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968)). "As long as the EEOC and the company are aware of the nature and scope of the allegations, the purposes behind the filing requirement are satisfied and no injustice or contravention of congressional intent occurs by allowing piggybacking." *Id.* at 1223.

Our threshold task is to determine the time frame that gave rise to Thiessen's claims of discrimination. *See Jones v.*

Firestone Tire & Rubber Co., 977 F.2d 527, 532 (11th Cir. 1992) (holding that, for purposes of single-filing rule, the first issue is the "effective scope of" the EEOC charge actually filed). Thiessen is relying on the continuing violation doctrine to bring in claims that arose more than 300 days prior to the filing of his EEOC charge. More specifically, Thiessen alleges that defendants implemented the blocker policy and began taking adverse action against him in pursuit of that policy beginning in September 1993. Further, Thiessen alleges that, notwithstanding Lanik's repudiation in the fall of 1994, defendants continued the policy and applied it against him in 1994 and 1995. If Thiessen can substantiate his allegations, the time frame for his claims would generally be from September 1993[11] through 1995. Accordingly, it would be this time frame during which the district court should make its determination of which opt-in plaintiffs to include in the class. In other words, the class should, at this stage of the proceedings, include all those plaintiffs whose related claims (i.e., adverse employment actions resulting from application of the blocker policy) arose between September 1993 and 1995.[12] Necessarily, this would include at least four of the

---

[11] Although Thiessen contends defendants generally had an ageist working environment, there is little, if any, evidence indicating that the blocker policy was actually implemented until mid-1993.

[12] If plaintiffs can survive summary judgment, the question of when the blocker policy was implemented, if at all, and how long it lasted, are factual questions for the jury. Assuming, *arguendo*, the case proceeds to the first stage of trial and the jury makes findings on these issues, those findings would be controlling for purposes of finalizing the class for purposes of the second stage proceedings. In this regard, we note there is some limited authority for a district court certifying a class for purposes of the first stage issue and reserving decision on certification for the second stage. *See Butler v. Home Depot*, 70 Fair Empl. Prac. Cas. (BNA) 51, 1996 WL 421436 (N.D. Cal. 1996).

eight excluded individuals, all of whom resigned or were laid off during or after September 1993.[13]

To view the problem in a different way, the question could be posed as whether each of the proposed opt-in plaintiffs could have filed a timely EEOC charge at the time Thiessen filed his charge. Because all of the proposed opt- in plaintiffs rely on the continuing violation doctrine, all could conceivably have filed timely charges at the time Thiessen filed his charge.[14] *See Purrington v. Univ. of Utah*, 996 F.2d 1025, 1028 (10th Cir. 1993) (noting that the continuing violation exception can be invoked by showing "the maintenance of a company-wide policy of discrimination both before and during the limitations period"). Accordingly, on remand, the district court is directed to include in the opt-in class all those plaintiffs who allegedly suffered adverse employment actions from September 1993 through 1995.

Having reached this conclusion, we find it unnecessary to address Thiessen's active concealment/equitable tolling argument. Even assuming, *arguendo*, defendants actively concealed the existence and implementation of the blocker

---

[13] These individuals include Julia Bates Allgood (resigned September 1993), Delilah Hicks (resigned April 1994), Eugene Laurenzo (laid-off September 1993), and Larry Nobles (laid-off September 1993).

[14] The few decisions dealing with "pattern-or-practice" cases appear to suggest the plaintiff class can include all employees affected by the illegal pattern-or-practice, regardless of whether or not they filed EEOC charges. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975) (rejecting defendants' contention "that no backpay can be awarded to those unnamed parties in the plaintiff class who have not themselves filed charges with the EEOC"); *Teamsters*, 431 U.S. at 331 (discussing scope of affected class entitled to individual relief); *Alexander v. Local 496, Laborers' Int'l Union of North America*, 177 F.3d 394, 399, 401 (6th Cir. 1999) (allowing all plaintiffs, including those who applied for jobs many years prior to filing of suit, to recover damages flowing from policy of discrimination).

policy from plaintiffs, only those plaintiffs who suffered adverse employment actions after implementation of the policy could be included within the class.

Deposition of defendants' corporate counsel

Thiessen contends the district court erred in refusing to allow him to depose defendants' corporate counsel, Sarah Gorman, regarding her investigation of the blocker policy and the alleged purging of corporate documents pertaining to the blocker policy. According to Thiessen, Gorman was the person who, in the spring of 1994 in response to a charge of age discrimination filed by Rick Richards, directed employees to purge company files of documents pertaining to the "blocker policy." Thiessen contends he has a right to depose Gorman regarding these "cover-up" activities, notwithstanding her status as corporate counsel and her involvement as counsel in this case.

We review a district court's determinations regarding waiver of attorney-client privilege and work-product protection for abuse of discretion. *Frontier Ref., Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 699 (10th Cir. 1998). In doing so, however, we review the district court's underlying factual findings for clear error, and its rulings on purely legal questions de novo. *Id.; see In re Grand Jury Proceedings*, 156 F.3d 1038, 1042 n.1 (10th Cir. 1998).

When the issue of deposing Gorman was raised in the district court, the parties and the court agreed it was controlled by the rule announced in *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986).[15] In *Shelton*, the Eighth Circuit held that depositions of opposing counsel should be limited to circumstances where the party seeking to take the deposition has shown that: (1) no means exist to obtain the

---

[15] *Shelton* was adopted by this court in *Boughton v. Cotter Corp.*, 65 F.3d 823, 830 (10th Cir. 1995).

information other than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case. After hearing arguments on the issue, the district court concluded that Thiessen had failed to demonstrate the first two requirements of the *Shelton* rule, i.e., that the information sought from Gorman was unavailable elsewhere and that the information was nonprivileged.

After reviewing the record on appeal, we find no abuse of discretion on the part of the district court in refusing to allow Thiessen to depose Gorman. In particular, Thiessen has failed to demonstrate that the district court's factual findings regarding the first *Shelton* requirement (i.e., the availability of other avenues for obtaining the information) were clearly erroneous. It is therefore unnecessary to address the district court's ruling on the second *Shelton* requirement (i.e., that the information sought was privileged).

III.

The decision of the district court decertifying the class of opt-in plaintiffs is REVERSED; the decision of the district court granting summary judgment in favor of defendants with respect to plaintiff Thiessen's individual claims of age discrimination is REVERSED; the decision of the district court excluding eight individuals from the opt-in class is REVERSED; the case is REMANDED to the district court for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Gary A. THIESSEN, Plaintiff-Appellant,

v.

GENERAL ELECTRIC CAPITAL CORPORATION, doing business as GE Capital, and its representatives; Montgomery Ward Credit Services, Inc., formerly known as Monogram Retailer Credit Services, Inc., a subsidiary of General Electric Capital Corporation, and its representatives, Defendants-Appellees, American Association of Retired Persons; National Employment Lawyers Association; Equal Employment Advisory Council, Amici Curiae.

No. 98-3208.

July 3, 2001.

Before BRISCOE, REAVLEY, and MURPHY, Circuit Judges.*

BRISCOE, Circuit Judge.

Plaintiff Gary Thiessen, an employee of defendants General Electric Capital Corporation (GE) and Montgomery Ward Credit Services, Inc., filed this putative class action under the Age Discrimination in Employment Act (ADEA) alleging that

---

* The Honorable Thomas M. Reavley, Senior Circuit Judge, United States Court of Appeals, Fifth Circuit, sitting by designation.

he and other similarly situated employees had been adversely affected by a pattern or practice of age discrimination on the part of defendants. Although the district court initially certified a class of twenty-three plaintiffs, it ultimately decertified the class, dismissed the opt-in plaintiffs, and granted summary judgment in favor of defendants with respect to Thiessen's individual claims. Thiessen now appeals claiming the district court erred in (1) decertifying the class and dismissing the opt-in plaintiffs, (2) granting summary judgment in favor of defendants with respect to his individual claims of age discrimination, (3) refusing to allow eight proposed plaintiffs to join the class, and (4) refusing to allow him to depose defendants' corporate counsel. We exercise jurisdiction pursuant to 28 U.S.C. § 1291, and reverse and remand for further proceedings.

I.

GE is the parent company of General Electric Capital Services (GECS), which in turn owns General Electric Capital Credit (GECC). Within GECC is the Retail Financial Services unit (RFS). In 1989, GECC purchased Monogram Retail Credit Services, Inc. (MRCSI), which had been the credit division of retailer Montgomery Ward. MRCSI became a subsidiary of the RFS unit after the acquisition, and in 1997, it was renamed Montgomery Ward Credit Services, Inc.[1]

Thiessen, who was born on March 7, 1947, began working as a credit manager trainee for MRCSI in 1968. From 1972 to mid-1994, he held various management positions within MRCSI and progressed to Band 4 on the company's five-band pay-grade scale. Between May 1994 and August 1996, Thiessen was placed on "special assignments" and assisted in the construction of MRCSI facilities in Kansas, Illinois, and Georgia. At the completion of those projects, Thiessen

---

[1] Because the bulk of relevant events in this case occurred prior to 1997, the opinion will refer primarily to MRCSI.

transferred to MRCSI's Las Vegas facility and assumed his current position as Band 4 collection manager. According to statements in the record, Thiessen's position at the Las Vegas facility was to "be eliminated as of May 30, 1998," and Thiessen allegedly was not "allowed to post for any other positions within GE." Aplt. App. 3 at 2.

On February 5, 1996, Thiessen filed a charge of discrimination with the Kansas Human Rights Commission and the Equal Employment Opportunity Commission (EEOC). He alleged that defendants had "an express but covert 'White Blockers' or 'Blockers' policy of discriminating against older white employees . . . by forcing [them] into early retirement or by eliminating [their] . . . position[s] through restructuring." *Id.* at Tab C. He further alleged that defendants exercised this "pattern and practice of employment decisions motivated by age and/or race and related factors" against him. *Id.* Specifically, Thiessen alleged he was repeatedly denied promotions because of his age and race. He subsequently filed this action alleging, in pertinent part, that defendants committed willful violations of the ADEA by denying him various promotions and placing him on "special assignments."[2] Appee. Supp. App. II at 003. Thiessen further alleged in his complaint that defendants undertook a pattern or practice of systematically discriminating against older employees.

The centerpiece of both Thiessen's individual claims of age discrimination and his claims of class-wide discrimination was a "blocker policy" allegedly adopted and implemented by defendants in the early 1990s. According to Thiessen, in 1991, "GECC management began referring to the older [executive] employees as 'blockers,' because in their view these employees were 'blocking' the advancement of younger,

---

[2] Although Thiessen's complaint also included a claim under Title VII for reverse race discrimination, he has since abandoned that claim.

newly recruited employees," in particular those younger employees who were participants in defendants' Management Development Program (MDP). *Id.* at 004. On March 2, 1992, Dave Ekedahl, a vice-president at RFS, and David Ferreira, vice-president of human resources for GECC, sent a memorandum to Steve Joyce, the then president and CEO of MRCSI, and Jeff Faucette, vice-president of human resources for MRCSI, asking, "What are plans to upgrade executive talent . . . remove blockers." Appee. Supp. App. I at 119. In response to this memo, Faucette directed his subordinates to prepare severance worksheets and retirement packages for various MRCSI employees over the age of forty, including Thiessen and several of the opt-in plaintiffs (Lawson, Gwen Colwell, Bob Demartine, Melva Heid, and Bob Marsonette) none of whom had requested such packages. On March 1, 1993, Ferreira circulated a memo to Faucette and others again discussing the subject of "blockers." Joyce and Faucette allegedly gave a presentation discussing Band 4 Blockers at a 1993 leadership review meeting attended by Ferreira. At a May 1993 meeting of MRCSI human resource managers, the concept of "blockers" was again discussed and outlined by Faucette. At a June 18, 1993, meeting at MRCSI's Merriam, Kansas facility, Faucette distributed a list of possible blockers to the human resource managers. The managers were effectively instructed to discuss the blocker policy with their respective operational managers, and assist the operational managers in identifying blockers and carrying out the policy.

Ultimately, Thiessen alleges, the operational managers implemented the "blocker policy" by taking various negative employment actions (e.g., negative performance evaluations, demotions, terminations, reductions in force, placement on "special projects," etc.) toward older employees identified as blockers.

Thiessen alleged defendants' "blocker policy" impacted all of the opt-in plaintiffs, each of whom allegedly suffered some type of adverse employment action. On an individual level,

Thiessen alleged he was identified by defendants as a blocker, and he was (1) denied a business center manager position in Las Vegas in 1993, (2) phased out of his position as National Attorney-Agency manager in 1994 and placed on "special assignment," (3) downgraded on his 1993 and 1994 performance reviews, and (4) denied two remittance processing manager positions in 1995.

Defendants denied having any pattern or practice of discrimination. Although they acknowledged there had been some discussion among certain employees of blockers, they denied that any type of "blocker policy" was implemented anywhere in the organization. Further, defendants alleged that in the fall of 1994, Gail Lanik, the CEO of MRCSI and successor to Steve Joyce expressly repudiated the notion that employment decisions were based on any "blocker policy." In response to defendants' denials, Thiessen alleged that, notwithstanding Lanik's purported repudiation, the "blocker policy" continued to be used on a covert basis. In support of his allegation, Thiessen pointed to alleged acts of employment discrimination against him and the other proposed plaintiffs after the fall of 1994. Thiessen also pointed to statistical evidence that allegedly demonstrated older workers were treated less favorably than younger employees.

During the course of discovery, the district court conditionally certified a class of twenty-three plaintiffs (Thiessen and twenty-two opt-in plaintiffs). *Thiessen v. General Elec. Capital Corp.*, 996 F. Supp. 1071, 1083 (D. Kan. 1998) (*Thiessen I*). In doing so, the district court noted:

> Mr. Thiessen has not simply averred the existence of a discriminatory policy or merely argued that circumstantially one should infer its existence by virtue of numerous people in the protected category having incurred adverse employment actions. Instead, he has come forward with direct evidence of an overall policy of purported age discrimination. Moreover, the names of some of the opt-in

> plaintiffs appear on "blocker" lists. The court believes this evidence cannot be so easily discounted just because the alleged discrimination was meted out "over a wide geographic range in a number of ways" and that it merits a threshold determination that the opt-in plaintiffs are "similarly situated" to Mr. Thiessen for purposes of something akin to conditional certification. However, the court remains troubled by a puzzling lack of any significant showing by Mr. Thiessen that there is a link between this alleged policy and the adverse job actions. Even if there was a discriminatory policy, the opt- in plaintiffs are only "similarly situated" if they can make a submissible case that they, too, were victims of it. It is because of that deficiency, at least in part, that the court is unwilling to grant final certification on the record before it.

Id. The court cautioned Thiessen that, "[i]n order to survive a motion to decertify," he would "need to set forth what he deem[ed] to be the specific link between the blocker policy and what occurred with each opt-in plaintiff." *Id.* Further, the court noted that if, in a subsequent motion to decertify, defendants could "truly convince the court that individual [defense] issues would predominate at trial, the contention that the opt-in plaintiffs [we]re similarly situated would likely be largely eviscerated." *Id.* at 1084. Finally, the court noted it would make a final determination regarding whether the trial of all the opt-in plaintiffs' claims could be coherently managed and presented "in a manner that w[ould] not confuse the jury or unduly prejudice any party." *Id.*

At the conclusion of discovery, defendants moved to decertify the class. Defendants also moved for summary judgment with respect to each of the twenty-three plaintiffs. The district court decertified the class, dismissed the opt-in plaintiffs' claims without prejudice, and granted summary judgment in favor of defendants with respect to Thiessen's individual claims of discrimination. *Thiessen v. General Elec.*

Capital Corp., 13 F. Supp. 2d 1131 (D. KAN. 1998) (*Thiessen II*).

II.

Decertification of plaintiff class and dismissal of opt-in plaintiffs

Thiessen contends the district court erred in decertifying the plaintiff class and dismissing the opt-in plaintiffs' claims without prejudice. We review for abuse of discretion a district court's decision to certify or decertify a class under the ADEA. *See Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213 (5th Cir. 1995); *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 51-52 (3d Cir. 1989). Under an abuse of discretion standard, we will not disturb the underlying decision unless we have a definite and firm conviction that the district court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances. *See Richardson v. Missouri Pacific R.R. Co.*, 186 F.3d 1273, 1276 (10th Cir. 1999).

Class actions under the ADEA are authorized by 29 U.S.C. § 626(b), which expressly borrows the opt-in class action mechanism of the Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b) (1994). Section 216(b) provides for a class action [3] where the complaining employees are "similarly situated." Unlike class actions under Rule 23, "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." *Id.*

---

[3] "Of course, this is not a true Rule 23 class action." *Kelley v. Alamo*, 964 F.2d 747, 747 n.1 (8th Cir. 1992). "Many courts and commentators, however, have used the vernacular of the Rule 23 class action for simplification and ease of understanding when discussing representative cases brought pursuant to § 16(b) of the FLSA." *Id.*

The overriding question here is whether Thiessen and the twenty-two opt-in plaintiffs are "similarly situated" for purposes of § 216(b). Unfortunately, § 216(b) does not define the term "similarly situated," and there is little circuit law on the subject. Federal district courts have adopted or discussed at least three approaches to determining whether plaintiffs are "similarly situated" for purposes of § 216(b). *See, e.g., Mooney*, 54 F.3d at 1213 (discussing two different approaches adopted by district courts); *Bayles v. American Med. Response of Colo., Inc.*, 950 F. Supp. 1053, 1058 (D. Colo. 1996). Under the first approach, a court determines, on an *ad hoc* case-by-case basis, whether plaintiffs are "similarly situated." *Mooney*, 54 F.3d at 1213. In utilizing this approach, a court typically makes an initial "notice stage" determination of whether plaintiffs are "similarly situated." *Vaszlavik v. Storage Tech. Corp.*, 175 F.R.D. 672, 678 (D. Colo. 1997). In doing so, a court "'require[s] nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan.'" *Id.* (quoting *Bayles*, 950 F. Supp. at 1066). At the conclusion of discovery (often prompted by a motion to decertify), the court then makes a second determination, utilizing a stricter standard of "similarly situated." *Id.* at 678. During this "second stage" analysis, a court reviews several factors, including "(1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant which appear to be individual to each plaintiff; (3) fairness and procedural considerations; and (4) whether plaintiffs made the filings required by the ADEA before instituting suit." *Id.*[4]

Under the second approach, district courts have incorporated into § 216(b) the requirements of current Federal Rule of Civil Procedure 23. *See Bayles*, 950 F. Supp. at

---

[4] We note that the Eleventh Circuit recently endorsed this "two-tiered" approach to certification of § 216(b) opt-in classes. *See Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208.

1060-61 (discussing cases adopting this approach). For example, in *Shushan v. University of Colo.*, 132 F.R.D. 263 (D.Colo. 1990), the district court concluded "that Rule 23(a)'s four prerequisites [numerosity, commonality, typicality, and adequacy of representation] and 23(b)(3)'s requirement that common questions of fact predominate should be used to determine whether plaintiffs are similarly situated." *Bayles*, 950 F. Supp. at 1061 (describing *Shushan* holding).

In a third approach, district courts have suggested incorporating into § 216(b) the requirements of the pre-1966 version of Rule 23, which allowed for "spurious" class actions. *See Bayles*, 950 F. Supp. at 1064 (holding that, because Advisory Committee Notes to the 1966 amendments make clear that the amendments were not intended to affect § 216(b) actions, "if Rule 23's standards apply . . . at all, it must be through Rule 23 as it existed prior to 1966"). Under the pre-1966 version of Rule 23, the "character of the right sought to be enforced for" the class of plaintiffs must be "several," there must be "a common question of law or fact affecting the several rights," and "a common relief" must be sought. *Id.* Further, under the old Rule 23, district courts "had inherent authority to refuse to proceed collectively where it would waste judicial resources or unfairly prejudice the party opposing the proposed class." *Id.* at 1065.

In the present case, the district court adopted the *ad hoc* approach to determining whether the plaintiffs were "similarly situated" for purposes of § 216(b). It first conditionally certified the class during the course of discovery, applying a fairly lenient standard for what constituted "similarly situated." During its second-stage analysis (prompted by the defendants' motion to decertify), the court applied a stricter standard, focusing on three factors: "(1) whether a sufficient link existed between the alleged blocker policy and the challenged employment decisions; (2) whether individual issues would predominate at trial; and (3) whether a trial of the action could be coherently managed and evidence presented in

a manner that would not confuse the jury or unduly prejudice any party." *Thiessen II*, 13 F. Supp. 2d at 1136. Ultimately, the district court concluded that all three factors warranted decertifying the class.

With respect to the first factor, the district court concluded "the mere fact that plaintiffs suffered adverse employment actions after having been designated as 'blockers,' standing alone, [wa]s insufficient to support an inference that a causal connection exist[ed] between the blocker policy and the adverse actions, particularly in light of the significant time lag and critical intervening events." *Id.* at 1140. The "significant time lag" was the time period between the plaintiffs' alleged designations as "blockers" in 1993 and the filing of Thiessen's EEOC charge in February 1996, which the district court concluded allowed Thiessen and the other opt-in plaintiffs to reach back 300 days from the charge, or until approximately April 11, 1995. The "critical intervening events" included the express repudiation of the "blocker policy" by MRCSI CEO Gail Lanik in the fall of 1994.[5] Because there was insufficient evidence of a "causal link between the blocker policy or plaintiffs' purported blocker status and the

---

[5] Shortly after Lanik assumed the reins as CEO of MRCSI, she terminated employee Rick Richards, an older, white executive who had worked for the company for years and who had allegedly been classified as a "blocker" in 1993. Following his discharge, Richards filed an EEOC charge of age discrimination (it is unclear from the record whether he also filed a lawsuit). Defendants' legal department responded to the charge by investigating the origination and implementation of the blocker policy and, according to plaintiffs, by purging company files of documents pertaining to the policy. Ultimately, defendants settled with Richards regarding his claim of discrimination. Following these events, defendants' counsel advised Lanik that she should expressly repudiate the blocker policy. Lanik did so in the fall of 1994; more specifically, in a series of meetings that included most of defendants' employees, Lanik stated there was no blocker policy and that employment decisions were to be made on the basis of merit. Plaintiffs allege that, notwithstanding this purported repudiation, defendants continued to maintain and apply the blocker policy.

challenged employment actions," the district court stated it could not "conclude that the plaintiffs [we]re similarly situated for purposes of proceeding as a collective action." *Id.* at 1141.

In conducting its analysis of the first factor, the district court also rejected the suggestion forwarded by Thiessen that it should apply a summary judgment-type standard in determining whether, for purposes of the "similarly situated" analysis, there was a sufficient link between the blocker policy and the adverse employment actions taken against plaintiffs. Instead, the court concluded that whether plaintiffs were "similarly situated" was a factual determination it was entitled to make based on the evidence presented by the parties.

With respect to the second factor, the district court noted that defendants had come forward with "highly individualized" defenses with regard to each of the various adverse employment actions alleged by plaintiffs. *Id.* at 1142. Allowing defendants to assert these defenses during a collective trial, the court concluded, would effectively result in "23 individual jury trials to determine defendants' liability to each plaintiff." *Id.* at 1143. Although the court acknowledged the "common thread" of the blocker policy, it nevertheless concluded that "the judicial inefficiencies" associated with resolving "what appear[ed] to be 23 distinct cases" clearly outweighed "any potential benefits in proceeding as a collective action." *Id.*

With respect to the third factor, the district court noted that plaintiffs had proposed separating the trial into two phases. Plaintiffs proposed that during the first phase of the trial the court "would submit the pattern and practice allegations as well as the individual claims and damages of nine plaintiffs [seven of whom appeared on various lists of proposed blockers, and two of whom were told they were blockers]." *Id.* According to plaintiffs, this initial phase would "involve a determination of common class issues relating to the existence, implementation, and discriminatory nature of the

Blocker Policy as well as class issues regarding wilfulness under the ADEA." *Id.* "If the jury determined that the blocker policy existed and that defendants had engaged in a pattern and practice of age discrimination, according to plaintiffs' proposed plan, then the same jury would . . . hear Phase Two of the trial, which would involve the remaining 14 plaintiffs." *Id.* at 1143-44.

The district court concluded that plaintiffs' proposed trial plan had "numerous, serious deficiencies." *Id.* at 1144. In particular, the court concluded that plaintiffs' plan "render[ed] individualized consideration of the claims impossible and impose[d] extraordinary burdens on the jury, both in terms of the quantity of evidence and the length of trial." *Id.* Thus, the court stated that "the absence of any workable trial management plan . . . reinforce[d]" its decision to decertify the class. *Id.*

The initial question, which we address de novo, is whether it was proper for the district court to adopt the *ad hoc* approach in determining whether plaintiffs were "similarly situated" for purposes of § 216(b). *See Mooney,* 54 F.3d at 1213 (applying a de novo standard of review in determining whether district court applied the proper legal standard in decertifying a class). Arguably, the *ad hoc* approach is the best of the three approaches outlined because it is not tied to the Rule 23 standards. Congress clearly chose not to have the Rule 23 standards apply to class actions under the ADEA, and instead adopted the "similarly situated" standard. To now interpret this "similarly situated" standard by simply incorporating the requirements of Rule 23 (either the current version or the pre-1966 version) would effectively ignore Congress' directive.[6] That said, however, there is little

---

[6] The Eleventh Circuit has apparently rejected the notion of relying on the Rule 23 requirements in deciding whether plaintiffs are "similarly situated" for purposes of § 216(b). *Grayson v. K Mart Corp.,* 79 F.3d 1086, 1096

difference in the various approaches. All approaches allow for consideration of the same or similar factors, and generally provide a district court with discretion to deny certification for trial management reasons. We find no error on the part of the district court in adopting the *ad hoc* approach.

Turning to the merits of Thiessen's arguments, the question is whether the district court abused its discretion in applying the *ad hoc* approach and decertifying the class. If plaintiffs were simply attempting to collectively assert their individual claims of discrimination, the decision to decertify would appear to be entirely proper. The problem, however, is that plaintiffs were asserting a pattern-or-practice claim modeled on *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). In particular, plaintiffs alleged that defendants, by way of the MDP and the blocker policy, had a company-wide policy of age discrimination. Stated differently, plaintiffs alleged that it was defendants' standard operating procedure, implemented through the MDP and the blocker policy, to discriminate against employees (particularly executive employees) on the basis of age. Although the district court acknowledged that all of the plaintiffs relied on the existence of the "blocker policy" to support their claims, it failed to recognize the pattern-or-practice nature of the class claim. For the reasons discussed below, we conclude the district court's failure in this regard adversely impacted its "similarly situated" analysis and resulted in an abuse of discretion.

Pattern-or-practice cases differ significantly from the far more common cases involving one or more claims of individualized discrimination. In a case involving individual claims of discrimination, the focus is on the reason(s) for the

---

n.12 (11th Cir. 1996) ("it is clear that the requirements for pursuing a § 216(b) class action are independent of, and unrelated to, the requirements for class action under Rule 23 of the Federal Rules of Civil Procedure").

particular employment decisions at issue. *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984). In contrast, the initial focus in a pattern-or-practice case is not on individual employment decisions, "but on a pattern of discriminatory decisionmaking." *Id.* Thus, the order and allocation of proof, as well as the overall nature of the trial proceedings, in a pattern-or-practice case differ dramatically from a case involving only individual claims of discrimination. *Teamsters*, 431 U.S. at 357-62.

Pattern-or-practice cases are typically tried in two or more stages. During the first stage of trial, the plaintiffs' "burden is to demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer or group of employers." *Id.* at 360. Thus, "[a]t the initial, 'liability' stage of a pattern-or-practice suit the [plaintiffs are] not required to offer evidence that each person for whom [they] will ultimately seek relief was a victim of the employer's discriminatory policy." *Id.* Instead, plaintiffs' "burden is to establish that such a policy existed." *Id.* "The burden then shifts to the employer to defeat the prima facie showing of a pattern or practice by demonstrating that the [plaintiffs'] proof is either inaccurate or insignificant." *Id.* "If an employer fails to rebut the inference that arises from the [plaintiffs'] prima facie case," the finder of fact can conclude "that a violation has occurred" and the trial court can award prospective equitable relief. *Id.* at 361. If the plaintiffs also seek "individual relief for the victims of the discriminatory practice," the case moves into the second or subsequent stages. *Id.* In these additional proceedings,[7] it must be determined whether each individual plaintiff was a victim of the discriminatory practice. Importantly, by having prevailed in the first stage of trial, the individual plaintiffs reap a

---

[7] "The second-stage of a pattern and practice claim is essentially a series of individual lawsuits, except that there is a shift of the burden of proof in the plaintiffs' favor." *Newberg on Class Actions* § 4.17 (3d. ed. 1992).

significant advantage for purposes of the second stage: they are entitled to a presumption that the employer had discriminated against them. *See Cooper*, 467 U.S. at 875.[8]

Returning to the district court's decision to decertify, we conclude the primary factor relied upon by the district court, "whether a sufficient link existed between the alleged blocker policy and the challenged employment decisions," *Thiessen II*, 13 F. Supp. 2d at 1136, was inappropriate given the pattern-or-practice nature of plaintiffs' claim. In particular, this factor encompasses factual issues relevant to both the first and second stages of the pattern-or-practice trial, i.e., whether the blocker policy continued after Lanik's alleged repudiation and, if it did, whether a link existed between that policy and the individual employment decisions affecting the named plaintiffs. Although these issues could be considered in the context of a properly framed summary judgment motion, it was improper for the district court to consider, and effectively make findings regarding, these questions in determining whether the plaintiffs were similarly situated for purposes of certifying a class. *See Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988) (holding that district court, in making class certification decision, should avoid focusing on merits of underlying class action); *Anderson v. City of Albuquerque*, 690 F.2d 796, 799 (10th Cir. 1982) (reversing and remanding denial of class certification where district court indicated its belief that plaintiff could not prevail on individual claims). By doing so, the district court essentially deprived plaintiffs of their right to have the issues decided by a jury, or to at least

---

[8] If the plaintiffs do not prevail during the first stage of a pattern-or-practice trial, they are nevertheless entitled to proceed on their individual claims of discrimination. *See Cooper*, 467 U.S. at 878 ("It could not be more plain that the rejection of a claim of classwide discrimination does not warrant the conclusion that no member of the class could have a valid individual claim."). Naturally, however, they are left to proceed under the normal *McDonnell Douglas* framework, rather than benefitting from a presumption of discrimination. *Id.* at 880.

have the court determine, under summary judgment standards, whether there was sufficient evidence to send the issue to the jury. Further, the district court failed to take into account the fact that, if plaintiffs were able to establish a pattern or practice of discrimination, they would be entitled to a presumption that the individual employment actions taken against them were the result of such discrimination. Indeed, the district court effectively deprived plaintiffs of this procedural advantage as well.

The district court's consideration of the second factor (whether individual issues would predominate at trial), was likewise adversely affected by its failure to recognize that plaintiffs were proceeding under a pattern-or-practice theory. Although it is true that defendants asserted "highly individualized" defenses to each of the instances of individual discrimination asserted by plaintiffs, those defenses would not become the focal point until the second stage of trial and could be dealt with in a series of individual trials, if necessary. With respect to the first stage of trial and the initial issues of whether they had in place a pattern or practice of discrimination and whether it continued after the fall of 1994, defendants had only a few common defenses. Specifically, defendants alleged that the blocker policy, though perhaps mentioned by Faucette at various times, was never implemented anywhere in the organization and was expressly repudiated by Lanik. Further, with respect to the discriminatory nature of the MDP program, defendants claimed it was open to all employees, including those over age forty. Thus, the presence of the "highly individualized" defenses clearly did not, as the district court concluded, outweigh "any potential benefits in proceeding as a collective action." As previously noted, there was a significant procedural advantage for plaintiffs to proceed in a collective action: if they prevailed in the first stage of trial, they would be entitled to a presumption of discrimination in subsequent proceedings to decide the merits of their individual claims. By

bowing to the individualized defenses relevant only to the second stage of trial, the district court deprived plaintiffs of this opportunity.

The district court's consideration of the third factor (trial management concerns) was also adversely affected by its failure to recognize the pattern-or-practice nature of plaintiffs' claim. Most notably, the district court failed to acknowledge that plaintiffs' proposed trial plan, though perhaps deficient in some respects, was consistent with the framework outlined in *Teamsters* for pattern-or-practice claims. The court also failed to make any effort to modify the plaintiffs' proposed trial plan. Finally, the district court was wrong in concluding that trying the case in two phases, as suggested by plaintiffs, "render[ed] individualized consideration of the claims impossible." *Thiessen II*, 13 F. Supp. 2d at 1143.

We conclude the district court abused its discretion in decertifying the class. Taking into consideration the "pattern or practice" nature of plaintiffs' lawsuit, as discussed above, plaintiffs were, in fact, "similarly situated" for purposes of § 216(b). In particular, many of the plaintiffs were specifically listed or classified by defendants as "blockers" and suffered adverse employment consequences during the relevant time period. The remainder of the plaintiffs, though never specifically classified by defendants as "blockers," fell within the alleged definition of "blockers" and were likewise subjected to adverse employment consequences during the relevant time period.

Grant of summary judgment

In connection with their motion to decertify, defendants moved for summary judgment with respect to all of Thiessen's claims for relief. After granting defendants' motion to decertify, the district court granted defendants' summary judgment motion in its entirety. In doing so, the court treated Thiessen's claims as non-class, individual claims of discrimination. The court concluded that "three of

Mr. Thiessen's claims, i.e., his 1993 failure-to-promote claim; his 'phase-out' claim; and his downgraded performance claim" were time barred because they occurred more than 300 days prior to the filing of Thiessen's EEOC charge. *Thiessen II*, 13 F. Supp. 2d at 1147. As for the remaining two claims (the denial of the two 1995 RPC manager positions), the district court concluded, after analyzing them under the *McDonnell Douglas* framework, that Thiessen had "failed to produce evidence from which a reasonable factfinder could conclude that defendants' proffered explanations for [their] actions were 'unworthy of credence.'" *Id.* at 1149.

On appeal, Thiessen contends the district court erred in granting summary judgment in favor of defendants. We review the district court's grant of summary judgment de novo. *Kidd v. Taos Ski Valley, Inc.*, 88 F.3d 848, 851 (10th Cir. 1996). Summary judgment is proper only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). We view the evidence and all reasonable inferences derived therefrom in the light most favorable to the nonmoving party. *Kidd*, 88 F.3d at 851.

As with defendants' motion to decertify, proper consideration of defendants' motion for summary judgment must take into account the fact that Thiessen and the opt-in plaintiffs were asserting a pattern-or-practice claim. Although there is little case authority discussing summary judgment motions in pattern-or-practice cases, we see no reason why summary judgment motions cannot be aimed at both the first and second stage issues. Presumably, however, such motions must be analyzed in light of the orders of proof peculiar to pattern-or-practice cases, and must be filed and considered at an appropriate stage of the proceedings. During the first stage of a pattern-or-practice case, for example, a summary judgment motion (whether filed by plaintiffs or defendants)

must focus solely on whether there is sufficient evidence demonstrating that defendants had in place a pattern or practice of discrimination during the relevant limitations period.[9] *See Teamsters*, 431 U.S. at 357-61. Until the first stage is resolved, we question whether it is proper for a court to consider summary judgment motions regarding second stage issues (i.e., whether individual plaintiffs are entitled to relief). Even assuming, *arguendo*, such motions can properly be considered prior to resolution of the first stage, it is clear they would not be analyzed under the typical *McDonnell-Douglas* framework. *See id.* (rejecting use of *McDonnell-Douglas* framework in pattern-or-pattern cases); *see also Davoll v. Webb*, 194 F.3d 1116, 1147 (10th Cir. 1999) (discussing *Teamsters* rejection of the *McDonnell-Douglas* test in pattern-or-practice cases). Instead, they would operate under the presumption that (1) defendants had in place a pattern or practice of discrimination, and (2) all employment decisions regarding the class plaintiffs were made pursuant to that pattern or practice. *See Teamsters*, 431 U.S. at 362.

---

[9] We note that the outcome of the first stage will essentially resolve the question of whether plaintiffs can properly rely on the "continuing violation" doctrine and seek relief for alleged acts of discrimination occurring more than 300 days prior to the filing of Thiessen's EEOC charge. *See Purrington v. Univ. of Utah*, 996 F.2d 1025, 1028 (10th Cir. 1993) (indicating plaintiffs can invoke continuing violation doctrine by demonstrating "the maintenance of a company-wide policy of discrimination both before and during the limitations period"); *see also Morgan v. National R.R. Passenger Corp.*, 232 F.3d 1008, 1015-16 (9th Cir. 2000) ("The second way to establish a continuing violation is to show a systematic policy or practice of discrimination that operated, in part, within the limitations period—a systemic violation."); *Lawton v. State Mut. Life Assur. Co. of Am.*, 101 F.3d 218, 222 (1st Cir. 1996) (noting that systemic violation has its roots in discriminatory policy or practice, and, so long as policy or practice itself continues into limitation period, challenger may be deemed to have filed timely complaint under continuing violation theory).

We conclude the district court erred in granting summary judgment in favor of defendants with respect to Thiessen's claims for relief. Consistent with our discussion of the class decertification decision, it is apparent that the first stage issues in this pattern-or-practice case have yet to be resolved. Thus, Thiessen's claims cannot at this point be treated as non-class claims of individual discrimination or analyzed under the *McDonnell-Douglas* framework.

Refusal to allow certain plaintiffs to join class

When it initially certified the plaintiff class during discovery, the district court addressed several issues, including whether the proposed opt-in plaintiffs, none of whom filed EEOC charges, could piggyback on the EEOC charge filed by Thiessen.[10] The district court first concluded that Thiessen's EEOC charge asserted allegations of class-wide discrimination and satisfied the notice requirements of 29 U.S.C. § 626(d). The district court then concluded that only "those individuals who could have filed timely EEOC charges at the time Mr. Thiessen actually filed his charge" could join as opt-in plaintiffs. More specifically, the court concluded that only those individuals who suffered adverse employment actions in the 300-day period prior to the filing of Thiessen's EEOC charge could opt in. Accordingly, the district court excluded from the class eight proposed opt-in plaintiffs, seven of whom "resigned or were terminated from employment long before the start of the 300-day filing period," and one of whom "failed to allege any discriminatory treatment in the 300-day filing window." *Thiessen I,* 996 F. Supp. at 1078.

---

[10] Normally, "[a] person who believes that he has been the victim of age discrimination must file a charge with the EEOC within 180 days of the adverse employment decision . . . if he is in a 'non-deferral state,' 29 U.S.C. § 626(d)(1); and within 300 days of the employer's wrongful conduct if he is in a 'deferral state,' 29 U.S.C. § 626(d)(2)." *Grayson,* 79 F.3d at 1100.

On appeal, Thiessen contends the district court erred in excluding these eight individuals from the opt-in class. According to Thiessen, the district court failed to consider evidence that defendants actively concealed the existence of the blocker policy. This evidence, Thiessen suggests, should have equitably tolled the time period for filing EEOC charges based on the blocker policy, and should have allowed all the proposed plaintiffs to opt in to the class. As previously noted, we apply an abuse of discretion standard in reviewing a district court's decision to certify a class. *Mooney*, 54 F.3d at 1213.

Federal courts "'universally hold that an individual who has not filed an administrative charge can opt-in to a suit filed by any similarly situated plaintiff under certain conditions.'" *Mooney*, 54 F.3d at 1223 (quoting *Anson v. Univ. of Tex. Health Sci. Ctr.*, 962 F.2d 539, 540 (5th Cir. 1992)); *see Mistretta v. Sandia Corp.*, 639 F.2d 588, 594-95 (10th Cir. 1980) (adopting single-filing rule in ADEA action). "This so-called 'single-filing rule' generally allows a plaintiff, who did not file an EEOC charge, to piggyback on the EEOC complaint filed by another person who is similarly situated." *Mooney*, 54 F.3d at 1223; *see Gitlitz v. Compagnie Nationale Air France*, 129 F.3d 554, 558 (11th Cir. 1997) ("A plaintiff who has not filed an individual EEOC charge may invoke the single-filing rule where such plaintiff is similarly situated to the person who actually filed an EEOC charge, and where the EEOC charge actually filed gave the employer notice of the collective or class-wide nature of the charge."). "The policy behind the single filing rule is that '[i]t would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC.'" *Mooney*, 54 F.3d at 1223 (quoting *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968)). "As long as the EEOC and the company are aware of the nature and scope of the allegations, the purposes behind the filing requirement are satisfied and no injustice or

contravention of congressional intent occurs by allowing piggybacking." *Id.* at 1223.

Our threshold task is to determine the time frame that gave rise to Thiessen's claims of discrimination. *See Jones v. Firestone Tire & Rubber Co.*, 977 F.2d 527, 532 (11th Cir. 1992) (holding that, for purposes of single-filing rule, the first issue is the "effective scope of" the EEOC charge actually filed). Thiessen is relying on the continuing violation doctrine to bring in claims that arose more than 300 days prior to the filing of his EEOC charge. More specifically, Thiessen alleges that defendants implemented the blocker policy and began taking adverse action against him in pursuit of that policy beginning in September 1993. Further, Thiessen alleges that, notwithstanding Lanik's repudiation in the fall of 1994, defendants continued the policy and applied it against him in 1994 and 1995. If Thiessen can substantiate his allegations, the time frame for his claims would generally be from September 1993[11] through 1995. Accordingly, it would be this time frame during which the district court should make its determination of which opt-in plaintiffs to include in the class. In other words, the class should, at this stage of the proceedings, include all those plaintiffs whose related claims (i.e., adverse employment actions resulting from application of the blocker policy) arose between September 1993 and 1995.[12] Necessarily, this would include at least four of the

---

[11] Although Thiessen contends defendants generally had an ageist working environment, there is little, if any, evidence indicating that the blocker policy was actually implemented until mid-1993.

[12] If plaintiffs can survive summary judgment, the question of when the blocker policy was implemented, if at all, and how long it lasted, are factual questions for the jury. Assuming, *arguendo*, the case proceeds to the first stage of trial and the jury makes findings on these issues, those findings would be controlling for purposes of finalizing the class for purposes of the second stage proceedings. In this regard, we note there is some limited authority for a district court certifying a class for purposes of

eight excluded individuals, all of whom resigned or were laid off during or after September 1993.[13]

To view the problem in a different way, the question could be posed as whether each of the proposed opt-in plaintiffs could have filed a timely EEOC charge at the time Thiessen filed his charge. Because all of the proposed opt-in plaintiffs rely on the continuing violation doctrine, all could conceivably have filed timely charges at the time Thiessen filed his charge.[14] *See Purrington v. Univ. of Utah*, 996 F.2d 1025, 1028 (10th Cir. 1993) (noting that the continuing violation exception can be invoked by showing "the maintenance of a company-wide policy of discrimination both before and during the limitations period"). Accordingly, on remand, the district court is directed to include in the opt-in class all those plaintiffs who allegedly suffered adverse employment actions from September 1993 through 1995.

---

the first stage issue and reserving decision on certification for the second stage. *See Butler v. Home Depot,* 70 Fair Empl. Prac. Cas. (BNA) 51, 1996 WL 421436 (N.D.Cal. 1996).

[13] These individuals include Julia-Bates Allgood (resigned September 1993), Delilah Hicks (resigned April 1994), Eugene Laurenzo (laid-off September 1993), and Larry Nobles (laid-off September 1993).

[14] The few decisions dealing with "pattern-or-practice" cases appear to suggest the plaintiff class can include all employees affected by the illegal pattern-or-practice, regardless of whether or not they filed EEOC charges. *See Albemarle Paper Co. v. Moody,* 422 U.S. 405, 414 n.8 (1975) (rejecting defendants' contention "that no backpay can be awarded to those unnamed parties in the plaintiff class who have not themselves filed charges with the EEOC"); *Teamsters,* 431 U.S. at 331 (discussing scope of affected class entitled to individual relief); *Alexander v. Local 496, Laborers' Int'l Union of North America,* 177 F.3d 394, 399, 401 (6th Cir. 1999) (allowing all plaintiffs, including those who applied for jobs many years prior to filing of suit, to recover damages flowing from policy of discrimination).

Having reached this conclusion, we find it unnecessary to address Thiessen's active concealment/equitable tolling argument. Even assuming, *arguendo*, defendants actively concealed the existence and implementation of the blocker policy from plaintiffs, only those plaintiffs who suffered adverse employment actions after implementation of the policy could be included within the class.

Deposition of defendants' corporate counsel

Thiessen contends the district court erred in refusing to allow him to depose defendants' corporate counsel, Sarah Gorman, regarding her investigation of the blocker policy and the alleged purging of corporate documents pertaining to the blocker policy. According to Thiessen, Gorman was the person who, in the spring of 1994 in response to a charge of age discrimination filed by Rick Richards, directed employees to purge company files of documents pertaining to the "blocker policy." Thiessen contends he has a right to depose Gorman regarding these "cover-up" activities, notwithstanding her status as corporate counsel and her involvement as counsel in this case.

We review a district court's determinations regarding waiver of attorney-client privilege and work-product protection for abuse of discretion. *Frontier Ref., Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 699 (10th Cir. 1998). In doing so, however, we review the district court's underlying factual findings for clear error, and its rulings on purely legal questions de novo. *Id.; see In re Grand Jury Proceedings*, 156 F.3d 1038, 1042 n.1 (10th Cir. 1998).

When the issue of deposing Gorman was raised in the district court, the parties and the court agreed it was controlled by the rule announced in *Shelton v. American Motors Corp.*,

805 F.2d 1323, 1327 (8th Cir. 1986).[15] In *Shelton,* the Eighth Circuit held that depositions of opposing counsel should be limited to circumstances where the party seeking to take the deposition has shown that: (1) no means exist to obtain the information other than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case. After hearing arguments on the issue, the district court concluded that Thiessen had failed to demonstrate the first two requirements of the *Shelton* rule, i.e., that the information sought from Gorman was unavailable elsewhere and that the information was nonprivileged.

After reviewing the record on appeal, we find no abuse of discretion on the part of the district court in refusing to allow Thiessen to depose Gorman. In particular, Thiessen has failed to demonstrate that the district court's factual findings regarding the first *Shelton* requirement (i.e., the availability of other avenues for obtaining the information) were clearly erroneous. It is therefore unnecessary to address the district court's ruling on the second *Shelton* requirement (i.e., that the information sought was privileged).

III.

The decision of the district court decertifying the class of opt-in plaintiffs is REVERSED; the decision of the district court granting summary judgment in favor of defendants with respect to plaintiff Thiessen's individual claims of age discrimination is REVERSED; the decision of the district court excluding eight individuals from the opt-in class is REVERSED; the case is REMANDED to the district court for further proceedings consistent with this opinion.

---

[15] *Shelton* was adopted by this court in *Boughton v. Cotter Corp.*, 65 F.3d 823, 830 (10th Cir. 1995).

**UNITED STATES DISTRICT COURT,
FOR THE DISTRICT OF KANSAS.**

Gary A. THIESSEN, Plaintiff,
v.
GENERAL ELECTRIC CAPITAL CORPORATION, d/b/a GE Capital, and Montgomery Ward Credit Services, Inc., f/k/a Monogram Retailer Credit Services, Inc.
Defendants.

No. 96-2410-JWL.

June 23, 1998.

MEMORANDUM AND ORDER

LUNGSTRUM, District Judge.

Plaintiff Gary A. Thiessen brought a collective action against defendants on behalf of himself and 22 opt-in plaintiffs under the Age Discrimination in Employment Act (ADEA). This matter is presently before the court on defendants' motion to decertify the collective action and to dismiss the opt-in plaintiffs (doc. # 319). For the reasons set forth below, the court grants defendants' motion to decertify the collective action and dismisses the claims of the opt-in plaintiffs.

In light of this ruling, defendants' motions for summary judgment with respect to each of the opt-in plaintiffs are moot and the court need only address defendants' motion for summary judgment with respect to plaintiff Gary A. Thiessen. As set forth in more detail below, the court grants defendants' motion for summary judgment as to plaintiff Gary A. Thiessen (doc. # 367).

I. Procedural History

Much of the procedural history of this case is set forth in the court's order provisionally certifying this action as a collective action. *See Thiessen v. General Elec. Capital Corp.*, 996 F. Supp. 1071, 1072-73 (D.Kan. 1998). Plaintiff Gary A. Thiessen filed his initial complaint on September 23, 1996 alleging violations of the ADEA arising out of his employment with defendants.[1] During the summer of 1996, Mr. Thiessen sent notices to potential plaintiffs for purposes of proceeding as a collective action under § 216(b).[2] A total of thirty individuals elected to opt-in to the action and filed the requisite consent forms.

After engaging in three months of discovery both on the merits and on the issue of the appropriate composition of the proposed opt-in group, Mr. Thiessen moved the court to join the opt-in plaintiffs and to certify the action as a collective action under § 216(b). At that time, based on the record evidence before it, the court found that Mr. Thiessen had made a sufficient threshold showing that twenty-two opt-in plaintiffs were "similarly situated" to justify a provisional certification as a collective action under § 216(b).[3] The court cautioned, however, that it would further review the certification issue in connection with a timely filed motion for decertification after the close of all discovery on liability.

The court did not make a conclusive determination on the certification issue in light of certain deficiencies in the record.

---

[1] Mr. Thiessen also asserts two claims of discrimination based on his race.

[2] The ADEA incorporates the procedures for enforcement of the Fair Labor Standards Act (FLSA). 29 U.S.C. § 626(b). A collective action under the ADEA is therefore governed by § 216(b) of the FLSA.

[3] The court concluded, however, that eight opt-in plaintiffs were precluded from joining the provisionally certified collective action based on procedural grounds.

With respect to Mr. Thiessen's evidence, the court highlighted the lack of any significant showing by Mr. Thiessen that a specific causal link existed between the alleged blocker policy and the adverse job actions at issue in the case. With respect to defendants' evidence, the court found that the record lacked the requisite detail to support defendants' bare assertions that it would assert defenses specific to the numerous individualized claims of each opt-in plaintiff. Without such detail, the court was unable to adequately assess whether individualized defenses would predominate at trial. Finally, the court expressed a concern with coherently managing a trial of the action and presenting the evidence in a manner that would not confuse the jury or unduly prejudice any party.

In their papers filed in connection with defendants' motion to decertify, the parties have attempted to alleviate the concerns expressed by the court in its provisional certification order. The court has carefully considered the parties' papers in light of the specific deficiencies identified in its previous order and is prepared to rule. As set forth in more detail below, the court grants defendants' motion to decertify and dismisses the claims of the opt-in plaintiffs.

II. Background

Although a brief overview of the factual context of this case is set forth in the court's order provisionally certifying this action as a collective action, *see Thiessen v. General Elec. Capital Corp.*, 996 F. Supp. 1071, 1072-73 (D.Kan. 1998), some additional background information may be helpful in understanding the court's ruling today. Although the parties have provided the court with much detail about the alleged "blocker" policy, the court focuses here only on those facts relevant to the "similarly situated" analysis—whether a specific link exists between the blocker concept and the adverse employment actions at issue with respect to each of the opt-in plaintiffs and whether individual issues in the case will predominate at trial.

Defendants consist of several, related corporate entities: General Electric Capital Corporation (GECC); Monogram Retail Credit Services, Inc. (MCRSI), now known as Montgomery Ward Credit (MWC); and Retail Financial Services (RFS). The plaintiff group consists primarily of former and current employees of MWC. In March 1992, Dave Ekedahl (Vice President of RFS) and David Ferreira (Vice President of Human Resources for GECC) sent a memorandum to Steve Joyce (President and CEO of MWC) and Jeff Faucette (Vice President of Human Resources for MWC) regarding suggested topics for discussion during the upcoming 1992 Leadership Review. A "Leadership Review" is an annual meeting of senior staff (*i.e.*, those employees who reported directly to Steve Joyce) to assess MWC's business. The discussion topics for the 1992 Leadership Review included "What are plans to upgrade executive talent level . . . remove blockers."[4]

According to plaintiffs, the term "blocker" referred to well-performing older employees whom high-level management considered to be blocking the career paths of fast-track younger management employees (referred to as "high potential" employees or "hi-pots").

In connection with the 1993 Leadership Review, Faucette prepared a one-page overview of his vision of the blocker concept. The document, entitled "Band 4 Blockers,"[5] reads as follows:

---

[4] According to plaintiffs' evidence, the blocker concept originated as early as 1991, when the term "blockage" first appeared in an RFS internal memorandum. For purposes of assessing whether plaintiffs are similarly situated, however, the court need not analyze this dated material.

[5] A "band" level refers to an employee's salary or grade level.

. Out of 47 Band 4 Associates, 26 are "Blockers" (55%)[6]

. Almost all have satisfactory or better performance
. Potential actions
-- Re-look at early retirement options
-- Some positions can be eliminated through restructuring
-- Continue to move high potential MRCSI associates around the "blockers" and into RCFS jobs

According to plaintiffs, Steve Joyce discussed this document with his senior staff during the 1993 Leadership Review. In addition, in May 1993, Jeff Faucette distributed and discussed this document during MWC's annual HR meeting in Macon, Georgia. All of MWC's Human Resource managers were present. Although Faucette did not identify any specific "blockers" during this meeting, he asked the HR managers to submit names of possible blockers.

In June 1993, Faucette met with the Merriam, Kansas-based HR employees to discuss the blocker concept. The attendees at the meeting were Karen Macke, MWC's manager of compensation and benefits, and the human resources managers for the three major divisions in MWC—Jackie Wolf, collections department; Brenda Thomas, cardholder services; and Marsha Mondschein, national recovery. The agenda for the meeting was entitled "Reorganization Strategy—Potential 'Blockers.'"

During this meeting, Faucette distributed a list of individuals specifically identified as "possible blockers." According to defendants, this list constituted an analysis of early retirement options for selected individuals based on Faucette's perception of the performance and promotability of the listed individuals. The birth date of all individuals is

---

[6] According to other documentary evidence, Plaintiffs Thiessen, Marsonette, DeMartine, Flower, Lawson and Heid are 6 of the 26 "blockers" referenced in this document.

included on the list and all individuals on the list were over the age of 40. Plaintiff Gary A. Thiessen and opt-in plaintiffs Robert DeMartine, Melva Heid, and Robert Marsonette appear on this list of "possible blockers." Opt-in plaintiff Gwen Colwell is listed on the same document in a separate category ("Over Age 55"). Opt-in plaintiffs James Lawson and Jim Flower appear on a separate handwritten list labeled "blockers."

During this June 1993 meeting, Faucette instructed the HR managers to make a note of the persons on the list within each of their respective divisions, meet with their respective operational managers, and discuss potential methods of "mov[ing] some of these blockers out."[7] In light of Faucette's request, each HR manager met with her respective operational manager to discuss the blocker concept: Brenda Thomas met with Rick Richards; Marsha Mondschein met with Mary Kinsey;[8] and Jackie Wolf met with Jerry Glover. The substance of these discussions, however, is the subject of much dispute and not relevant to the court's analysis.

According to plaintiffs, the blocker policy carried over into 1994. In support of this contention, plaintiffs highlight two 1994 Leadership Review charts which depict each employee's potential as measured against the employee's performance. According to these charts, an employee could be "meeting" or "exceeding" performance expectations and yet have "steady" potential rather than "high potential." Several of the plaintiffs

---

[7] According to defendants, the HR managers were instructed to discuss the feasibility of operating without the listed employees and potential methods of seeking the employees' agreement to retirement packages.

[8] In November 1993, a presentation given by Kinsey indicates that "two blockers were separated" from the organization in 1993. According to plaintiffs, Kinsey made employment decisions with respect to Plaintiffs Osburn, Croy, Shirey, Lawson and Thiessen. The significance of this purported "link" is discussed in footnote 19 of this opinion.

are included in this category. Although these charts do not reference the employees' ages and do not mention the term "blocker," plaintiffs nonetheless maintain that these charts are further evidence of the blocker policy because, by definition, an employee who was meeting or exceeding expectations but considered "nonpromotable" was a "blocker."[9]

In January 1994, Steve Joyce left MWC to accept a promotion to the position of Vice President of Business Development for GECC. Joyce was succeeded as President and CEO of MWC by Gail Lanik, who was new to MWC. Moreover, Pat Friar, Senior Vice President of Human Resources for RFS, assumed human resources responsibility for MWC and became Faucette's superior. After noting a number of serious deficiencies in Faucette's performance, Lanik and Friar demoted Faucette to a lesser position, which was outside of MWC.

In the fall of 1994, in light of her view that the blocker concept had caused a "lack of cohesiveness in [the] organization," Lanik publicly repudiated the concept. In a series of meetings with MWC managers, Lanik stated that the blocker concept "was not the practice of GE nor my practice." Lanik also stated that GE based its employment decisions "strictly on nondiscriminatory factors such as employees' qualifications and performance."[10]

---

[9] Contrary to plaintiff's assertion, the charts do not characterize any employee as "nonpromotable." Rather, the chart describes an employee's potential as "high potential," "evolving leader," or "steady."

[10] A number of witnesses, including at least one of the plaintiffs, confirmed Lanik's repudiation of the blocker concept. *See* Deposition of Plaintiff Flower, at 76 (Lanik said, "At this point the word 'blockers' is dead. There's no such thing. I don't want to hear it."). *See also* Deposition of Karen Macke, at 198 (Lanik told "all the managers how no program like that would exist under her presidency.").

Other than their bare allegations that each of the challenged employment decisions at issue here were based on the blocker policy or plaintiffs' "blocker" status, plaintiffs have set forth no evidence that the blocker policy or concept carried over into 1995.

III. The "Similarly Situated" Analysis

The ADEA permits a plaintiff to proceed on behalf of himself or herself "and other employees similarly situated." 29 U.S.C. § 216(b); 29 U.S.C. § 626(b) (incorporating remedial and procedural provisions of the FLSA). In February 1998, the court concluded that, in light of plaintiffs' "blocker" evidence, the plaintiffs had made a sufficient threshold showing that they were "similarly situated" and provisionally certified the action as a collective action.[11] At that time, the court advised the parties that the final certification determination would focus primarily on three factors: (1) whether a sufficient link existed between the alleged blocker policy and the challenged employment decisions; (2) whether individual issues would predominate at trial; and (3) whether a trial of the action could be coherently managed and evidence presented in a manner that would not confuse the jury or unduly prejudice any party.

As set forth below, the court concludes that plaintiffs have failed to set forth sufficient evidence that a causal link exists between the alleged blocker policy or plaintiffs' "blocker" status and what occurred with respect to each plaintiff. Moreover, defendants have convinced the court that individual issues would predominate at trial. Finally, the court believes that a trial of this action would consist of highly detailed, voluminous evidence far beyond the limit of what a jury could

---

[11] A review of the applicable standards often utilized by courts in making the "similarly situated" determination is set forth in the court's earlier opinion. *See Thiessen v. General Elec. Capital Corp.*, 996 F. Supp. 1071, 1079-80 (D.Kan. 1998).

reasonably be expected to absorb, retain and process. Accordingly, the court concludes that plaintiffs cannot be considered "similarly situated" for purposes of proceeding as a collective action and grants defendants' motion to decertify.

A. The Blocker Policy

In its order provisionally certifying this action as a collective action, the court concluded that plaintiffs' "direct evidence of an overall policy of purported age discrimination" (*i.e.*, the blocker lists and related documents) merited a threshold determination that the plaintiffs were similarly situated to Mr. Thiessen despite significant differences among the opt-in group. *See Thiessen v. General Elec. Capital Corp.*, 996 F. Supp. 1071, 1081-83 (D.Kan. 1998). The court forewarned plaintiffs, however, that final certification would require a "significant showing" of a specific link between defendants' alleged blocker policy and each of the adverse employment actions at issue in this case. *Id.* As set forth below, plaintiffs have not met their burden.

1. The Applicable Standard

Despite the court's explicit instruction that in order to survive a decertification motion plaintiffs would need to come forward with evidence of a nexus between the blocker policy and what occurred with each plaintiff, and perhaps recognizing the tenuous nature of their "similarly situated" argument, plaintiffs insist that whether the blocker policy existed and whether each plaintiff was affected by the policy is properly resolved by the jury. According to plaintiffs, the role of the court is to determine only whether plaintiffs have set forth sufficient evidence to provide a "reasonable basis for

crediting plaintiffs' assertions" that they are similarly situated.[12]

To the extent plaintiffs are suggesting that the court adhere to a standard akin to that utilized at the summary judgment stage, the court rejects plaintiffs' argument. The court is not merely required to assess, under an alleged "reasonable basis" standard, whether plaintiffs have created a submissible issue that they are similarly situated. Rather, the court makes a factual determination whether plaintiffs have carried their burden of proving that they are similarly situated. *See Reed v. Bowen,* 849 F.2d 1307, 1309 (10th Cir. 1988) ("The decision whether to grant or deny certification of a class belongs within the discretion of the trial court.") (Rule 23 context); *Mooney v. Aramco Servs. Co.,* 54 F.3d 1207, 1214 (5th Cir. 1995) (on motion for decertification after discovery is largely complete, the court makes a factual determination on the similarly

---

[12] In support of their argument that the court should apply a "reasonable basis" test in analyzing the "similarly situated" issue, plaintiffs direct the court to *Hyman v. First Union Corp.,* 982 F. Supp. 1 (D.D.C. 1997). To the extent the *Hyman* decision espouses the use of a summary judgment-type standard with respect to the "similarly situated" question, the court does not believe such a standard is appropriate at this late stage in the litigation process. Although the court may have been inclined to apply such a standard at the so-called "notice stage" of the certification process, plaintiffs did not seek certification at the notice stage. *See Thiessen v. General Elec. Capital Corp.,* 996 F. Supp. 1071, 1072, 1080 (D.Kan. 1998). Rather, plaintiffs sought certification only after thirty plaintiffs filed consent forms and the parties had engaged in considerable discovery. *Id.* Even then, the court utilized a fairly lenient standard in deciding to provisionally certify the action as a collective action. *Id.* at 1080. It is far too late in the day, however, for plaintiffs to argue that they need only provide a "reasonable basis" for the court to believe they are similarly situated. *See Reed v. Bowen,* 849 F.2d 1307, 1309 (10th Cir. 1988) ("It is neither practical nor prudential to engage the powerful machinery of a class action on the basis of a hypothetical. Crucial factors, such as economies of time, money, judicial resources, and the avoidance of multiple litigation, can remain wholly unsatisfied when certification occurs based on guesswork.").

situated question); *Bayles v. American Med. Response of Colorado,* 950 F. Supp. 1053, 1067 (D.Colo. 1996) (plaintiffs have the burden of showing that they are similarly situated).

In support of their proffered standard, plaintiffs suggest that the court, by requiring evidence of a link between the blocker policy and the employment decisions at issue, is improperly resolving the merits of plaintiffs' claims. *See Adamson v. Bowen,* 855 F.2d 668, 676 (10th Cir. 1988) (in making a class certification determination, the district court should avoid focusing on the merits underlying the class claim); *Anderson v. City of Albuquerque,* 690 F.2d 796, 799 (10th Cir. 1982) (reversing and remanding denial of class certification where district court noted its belief that plaintiff could not prevail on her individual claim). Contrary to plaintiffs' position, the court is not resolving the underlying merits of plaintiffs' claims. In requiring evidence of a link between the policy and the challenged employment actions, the court does not determine whether plaintiffs may individually state a cause of action or whether plaintiffs may ultimately prevail on the merits. Although the court has independently determined that Mr. Thiessen has not met his summary judgment burden on his individual claims, it may well be that other plaintiffs can state viable claims under the ADEA. Moreover, evidence with respect to the blocker policy or a plaintiff's blocker status may be relevant at the trial of an individual plaintiff's case. The court is simply determining whether the requirements of § 216(b) have been satisfied where, as here, plaintiffs concede that the only possible common thread among the plaintiff group is the existence of the blocker policy and adverse job actions which plaintiffs attribute, without more, to the application of the policy.

Plaintiffs also rely on the Tenth Circuit's opinion in *Whalen v. Unit Rig, Inc.,* 974 F.2d 1248 (10th Cir. 1992) in support of their argument that they need not establish the existence of any link between the blocker policy and the challenged employment decisions at issue. The *Whalen* decision,

however, is distinguishable and, in any event, is consistent with the court's holding today. In *Whalen,* Unit Rig and Equipment Company ("URE") was sold to Terex Corporation. 974 F.2d at 1250. The newly acquired entity was named Unit Rig, Inc. ("URI"). *Id.* As part of the acquisition process, all URE employees (approximately 500 people) were discharged, and all but forty-six were hired by URI on the following day without a formal job application process. *Id.*

Plaintiff John Whalen was among the forty-six employees not hired by URI. *Id.* He was sixty-three years old and had held the job of Controller at the time of his discharge. *Id.* The Controller hired after the acquisition was twenty-nine years old. *Id.* Shortly thereafter, Mr. Whalen filed suit under the ADEA. *Id.* Mr. Whalen's lawsuit went to trial and he received a jury verdict in his favor. *Id.* Evidence was introduced at trial that a Terex vice president, Larry Skaff, had requested lists of URE employees in declining order of age and that these lists were delivered to Mr. Skaff and the president of URI at the time these two men made employment decisions regarding URI. *Id.*

On appeal, defendants argued that Mr. Whalen failed to prove that age was a determining factor in defendants' actions and that their proffered reasons for the actions were pretextual. *Id.* at 1252. The Tenth Circuit rejected this argument and found that Mr. Skaff's request for employee lists in declining order of age (and the delivery of those lists) at the time Mr. Skaff and URI's president made the employment decisions, along with other evidence, was susceptible to the reasonable inference that Mr. Whalen's age was a determining factor in defendants' actions and that defendants' proffered explanations were pretextual. *Id.*

Plaintiffs contend that the *Whalen* case is significant (and analogous to this case) because the Tenth Circuit found that the employee lists could support an inference that age was a determining factor in defendants' actions toward Mr. Whalen

despite the absence of any evidence of a specific link between defendants' failure to hire Mr. Whalen and any actual use of the employee list. Thus, according to plaintiffs, the "ultimate resolution of the nexus between defendants' discriminatory Blocker Policy and plaintiffs' claims is properly for the jury." *See id.* at 1253 ("Resolving the factual dispute over whether the lists were used for employment decisions would properly be a matter for the jury.").

Plaintiffs' reliance on the *Whalen* decision is misplaced for three reasons. First, the Tenth Circuit in *Whalen* simply held that an employee list, in addition to other evidence admitted at trial, constituted sufficient evidence to sustain a verdict in favor of a single plaintiff. Here, the only issue for the court is whether these 23 plaintiffs are "similarly situated" for purposes of proceeding as a collective action when, by plaintiffs' own admission, the only possible common thread among them is defendants' alleged blocker policy. Second, contrary to plaintiffs' suggestion, the court is not requiring plaintiffs to "prove" the existence of a link between the blocker policy and what occurred with each plaintiff; rather, the court is merely requiring plaintiffs to show that they are indeed similarly situated (*i.e.*, by setting forth sufficient evidence to make a submissible case that a link existed). Finally, the very decisionmakers in *Whalen* requested and received the employee list *at the very time* the individuals were making the challenged employment actions. Here, the actionable adverse actions occurred years after the formulation of the blocker list, years after Faucette and Joyce left MWC, and long after Gail Lanik repudiated the blocker concept.[13]

---

[13] Some of the challenged employment decisions occurred closer in time to the introduction of the blocker policy and the creation of the blocker lists. These events, however, occurred well outside the 300-day filing window and, as such, are not actionable. See Section IV.C (no application of continuing violation theory where plaintiffs have failed to show application of blocker policy within 300-day filing period and policy was

The mere fact that plaintiffs suffered adverse job actions after having been designated as "blockers," without more, simply does not support an inference that a causal connection existed between the blocker policy and the adverse actions, particularly in light of the passage of tir e and these intervening events. *Cf. Conner v. Schnuck Markets, Inc.*, 121 F.3d 1390, 1395 (10th Cir. 1997) (unless the employer's adverse action "is very closely connected in time to the protected conduct, the plaintiff will need to rely on additional evidence beyond mere temporal proximity to establish causation"; four-month time lag between plaintiff's protected activity and his termination, without more, is insufficient to justify an inference of causation); *Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997) (three-month period between plaintiffs' protected activity and her termination, standing alone, does not demonstrate a causal connection); *Redmond v. Day & Zimmerman, Inc.*, 897 F. Supp. 1380, 1386 (D.Kan. 1995) (no inference of causal connection where defendant terminated plaintiff's employment more than three years after plaintiff filed initial charge of discrimination) (citing *Burrus v. United Tel. Co.*, 683 F.2d 339, 343 (10th Cir. 1982) (plaintiffs failed to establish prima facie case of retaliation where three years passed between the filing of her charges and her termination)), *aff'd*, 85 F.3d 641 (10th Cir. 1996).

For the reasons set forth above, the court rejects plaintiffs' contention that they need not establish a link between the blocker policy and the challenged employment decisions here.

---

repudiated prior to 300-day filing window). Moreover, even if an inference of causation could be drawn with respect to these events, these events do not give rise to a further inference that adverse actions occurring within the 300-day filing window were based on plaintiffs' blocker status or the blocker policy in light of the significant time lag and intervening events (*i.e.*, Faucette and Joyce left MWC in early 1994 and Lanik repudiated the blocker policy in the fall of 1994).

As explicitly set forth in its previous order, the court will require plaintiffs to come forward with sufficient evidence that a causal link exists between defendants' blocker policy and each of the challenged employment actions. Without such evidence, the plaintiffs simply cannot be deemed "similarly situated" for purposes of proceeding as a collective action.

2. Plaintiffs' "Evidence" of a Causal Link

Despite their belief that the existence of a link between the blocker policy and the challenged employment actions is properly determined by the jury, plaintiffs urge that the following evidence establishes the requisite nexus: (1) Seven of the plaintiffs were specifically identified as "blockers" on various versions of the blocker lists;[14] (2) two of the plaintiffs were informed that they were "blockers";[15] and (3) the remaining plaintiffs "fit squarely within the definition of 'blockers.'" In addition, according to plaintiffs, each plaintiff suffered one of the potential actions set forth in defendants' blocker documents.[16] As set forth above, however, the mere fact that plaintiffs suffered adverse employment actions after having been designated as "blockers," standing alone, is insufficient to support an inference that a causal connection exists between the blocker policy and the adverse actions, particularly in light of the significant time lag and critical intervening events. See pp. 15-17 & n.14.

---

[14] The seven plaintiffs whose names appear on the blocker lists are Plaintiffs Thiessen, Heid, Marsonette, Colwell, Lawson, Flower and DeMartine.

[15] Plaintiffs Fries and Kaesberg were informed by defendants that they were "blockers."

[16] The potential actions as set forth in the "Band 4 Blockers" document, for example, include early retirement, elimination of position, and moving high potential MRCSI associates around the blockers.

Plaintiffs vigorously contend, however, that this "direct evidence" (*i.e.*, the blocker lists) has a "heavy duty evidentiary effect" sufficient to establish the requisite nexus. The court disagrees. Although the court recognized in its previous order that plaintiffs had come forward with "direct evidence *of an overall policy* of purported age discrimination," the blocker policy does not constitute direct evidence of discrimination with respect to each plaintiff. At best, the blocker policy is circumstantial evidence from which an inference of discrimination can be drawn if the requisite link is shown. *See Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1457 (10th Cir. 1994) (no inference of pretext where plaintiff failed to connect memos outlining hidden policy of purported age discrimination "in any meaningful way" to her layoff). *Cf. Bolton v. Scrivner, Inc.*, 36 F.3d 939, 944 (10th Cir. 1994) (comments by plaintiff's supervisor that plaintiff was an "old fart" does not show pretext because plaintiff failed to demonstrate a nexus between those comments and defendant's decision not to rehire him); *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 531 (10th Cir. 1994) (discriminatory statements are "insufficient to create a jury issue in an ADEA case" unless linked to relevant personnel action).

Plaintiffs also seek to establish a link between the blocker policy and each of the challenged actions by claiming that defendants' Human Resources personnel, who had been educated with respect to the blocker policy, were the persons responsible for the employment decisions at issue. This argument is unavailing. In support of their "cental decisionmaking" argument, plaintiffs direct the court to the 1994 Leadership Review charts depicting each employee's performance and potential. Although these charts were apparently prepared by defendants' HR employees, the charts fall far short of suggesting that these HR employees had any involvement in the specific, particularized employment actions

taken with respect to these 23 plaintiffs.[17] Rather, the evidence establishes that operational managers, rather than Human Resources employees, made the personnel decisions challenged by plaintiffs here. The following examples, supported by affidavits and uncontroverted by plaintiffs, illustrate the tenuous nature of plaintiffs' "central decisionmaking" argument:

> Justin Boyle, Manager of the Las Vegas Regional collections Center, chose Carlos Gonzalez, Denise Trainor and Emily Love over Plaintiff Colwell for the 1993 Portfolio Control Manager positions.
>
> John Deets, Manager of Client Services, decided to rate Plaintiff DeMartine a "3" instead of a "2" on his 1997 performance appraisal.
>
> Werner Marschall, then Vice President of Business Information Systems, rated Plaintiff Flower a "3" instead of a "2" on his 1995 performance appraisal.
>
> Lisa Rometty, Client Services Manager for MWC, decided to place Plaintiff Grisham on a disciplinary action plan in 1996.
>
> Marc Sheinbaum, President and CEO of MWC, decided to eliminate the Chicago Systems Division, including Plaintiff Kaesberg's position with the Division, in 1997.

---

[17] Plaintiffs also suggest that these "performance and potential" charts, when coupled with the blocker lists, are sufficient to establish the requisite nexus between the policy and the adverse actions. This argument, too, is unconvincing. On their face, the charts do not relate to any employment decisions, do not reference the age or birth dates of any employees, and do not mention the term "blocker." Although these charts may be relevant to analysis of an individual plaintiff's ADEA claim, the charts simply do not support a finding that these 23 plaintiffs are similarly situated for purposes of proceeding to trial as a collective action.

David Caldwell, Recovery Operations Manager in Lenexa at the time, decided to counsel Plaintiff Serra about disciplinary and performance issues in 1997.

Robert Mills, Senior Vice President of Retailer Financial Services Manufacturing, selected Bret Plymire, rather than Plaintiff Thiessen, for the Arlington/Grand Prairie RPC Manager position.

Bill Forget, Vice President of Production Services, decided not to hire Plaintiff Trice for the 1995 Senior Manager Remittance Processing position.

In the absence of sufficient evidence that these operational managers were simply carrying out orders from their respective HR managers, defendants' HR employees fail to provide the requisite nexus between the blocker policy and the adverse actions challenged by plaintiffs. Moreover, although Brenda Thomas, Marsha Mondschein and Jackie Wolf met with their respective client managers (Rick Richards, Mary Kinsey and Jerry Glover) shortly after the June 1993 "blocker" meeting with Faucette, plaintiffs have simply failed to show in any meaningful way that Richards, Kinsey or Glover applied the blocker policy with respect to any of the employment decisions at issue here.[18]

---

[18] In their statement of facts, plaintiffs vaguely suggest that the requisite link is established because Mary Kinsey, during a November 1993 presentation, referred to "two blockers" that were separated that year. It is clear that the "two blockers" reference does not relate to any of the plaintiffs in this action. Plaintiffs contend, however, that Kinsey was enlisted in the blocker program and was involved in employment decisions with respect to Plaintiffs Thiessen, Osburn, Croy, Shirey and Lawson. Although plaintiffs failed to cite to the record in support of this allegation, the court has reviewed the relevant summary judgment papers in an effort to discern the nature and extent of Kinsey's involvement in any employment decisions with respect to these individuals.

Based on the court's review, it appears that neither Plaintiff Shirey nor Plaintiff Lawson have asserted any claims based on any decisions made by

In sum, despite the court's forewarning, plaintiffs have failed to come forward with sufficient evidence of a causal link between the blocker policy or plaintiffs' purported blocker status and the challenged employment actions. Without such evidence, the court simply cannot conclude that the plaintiffs are similarly situated for purposes of proceeding as a collective action when, by their own admission, the blocker policy is the only possible connection among the plaintiff group. As such, the court grants defendants' motion to decertify and dismisses the claims of the opt-in plaintiffs.

B. Individualized Defenses Asserted by Defendants

Not only have plaintiffs failed to establish a causal link between the blocker policy and the adverse employment actions at issue in this case, but defendants have convinced the court that individual issues would predominate at trial. Specifically, the court concludes that the numerous, particularized reasons set forth by defendants with respect to each of the challenged employment actions render collective treatment inappropriate. *See, e.g., Bayles v. American Med. Response of Colorado,* 950 F. Supp. 1053, 1067 (D.Colo. 1996) (decertifying collective action in FLSA context where

---

Kinsey. Moreover, the claims asserted by Plaintiffs Thiessen, Osburn and Croy with respect to Kinsey's decisions occurred outside the 300-day filing window and, accordingly, are not actionable. See Section IV.C (no application of continuing violation theory where plaintiffs have failed to show application of blocker policy within 300-day filing peiod and policy was repudiated prior to 300-day filing period). Although the court has independently determined that Plaintiff Thiessen has not met his summary judgment burden, even if an inference of causation could be drawn with respect to Plaintiffs Croy and Osburn, such an inference is woefully inadequate to suggest that all 23 plaintiffs are similarly situated for purposes of proceeding to trial as a collective action. Plaintiffs have not suggested that the court consider whether Plaintiffs Croy and Osburn should proceed together as a subclass of "similarly situated" plaintiffs and, in the absence of such a request, the court declines to engage in this analysis.

the case was "fraught with questions requiring distinct proof as to individual plaintiffs" and defenses could not be addressed on a class-wide basis); *Brooks v. Bellsouth Telecommunications, Inc.*, 164 F.R.D. 561, 569 (N.D.Ala. 1995) (denying certification in part because the "circumstances of employment termination are diverse" and the court "would be faced with numerous individualized defenses"), *aff'd*, 114 F.3d 1202 (11th Cir. 1997); *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 370 (D.N.J. 1987) (decertifying collective action where the "attendant defenses would not provide for an efficient proceeding").

By way of example, the court considers the claims of the plaintiffs whose names appear on the blocker lists together with defendants' explanations for the challenged employment actions.[19] The following summaries plainly indicate the highly individualized nature of the defenses asserted by defendants:

> *Opt-in Plaintiff Gwen Colwell:* Colwell claims, *inter alia*, that she was discriminatorily denied one of three Portfolio Control Manager positions in 1993 based on her age. According to defendants, Carlos Gonzalez, Denise Trainor and Emily Love were selected for the positions because MWC sought candidates with superior technical skills (possessed by Gonzalez); superior team building skills (possessed by Love); or a superior breadth of experience (possessed by Trainor, who had a college degree). Colwell, defendants maintain, was not well versed in the team building concept, had a narrow base of experience and did not have a college degree.

---

[19] In setting forth these examples, the court focuses only on defendants' proffered nondiscriminatory reasons in an effort to illustrate the highly individualized defenses and particularized reasons for the challenged actions. In doing so, the court expresses no opinion on the merits of the proffered reasons and does not address other defenses raised by the defendants (*e.g.*, waiver issues, procedural bars, etc.).

Opt-in Plaintiff Robert DeMartine: DeMartine alleges, *inter alia,* that defendants discriminatorily downgraded his 1996 performance evaluation based on his age. This evaluation was completed by DeMartine's manager, John Deets. According to Deets, DeMartine received a "3" on this evaluation instead of a "2" because of shortcomings in the areas of oversight and follow-through that resulted in, for example, a "stalled" new audit performance project. In addition, according to Deets, DeMartine failed to develop strategies to maximize MWC's auditing abilities, to develop creative incentives for agencies' performance, and to proactively develop solutions to improve overall performance.

Opt-in Plaintiff James Flower: Flower alleges, *inter alia,* that he was discriminatorily laid off in 1997 based on his age. According to defendants, Flower was laid off when MWC eliminated its Chicago Systems group, including Flower's position in that group. The decision to eliminate the Chicago Systems group was made by Marc Sheinbaum, the current President and CEO of MWC. Sheinbaum averred that this group was eliminated because the group's work often duplicated the capabilities available in other locations and because the installation of better systems (such as the creation of a readily accessible data warehouse for customer information) rendered a portion of the *ad hoc* responsibilities performed by the Chicago Systems group obsolete.

Opt-in Plaintiff Melva Heid: Heid claims, *inter alia,* that she was discriminatorily denied the Las Vegas Human Resources Manager position in 1995 based on her age. According to Marc Lopez, one of the decisionmakers involved in filling the position, the successful candidate had significant and recent HR experience, solid interpersonal skills, and a proven ability to handle difficult employee situations. Lopez believed that Heid's HR experience was outdated (she had not been employed in a HR capacity

since 1989), that she had difficulty relating with employees at all levels of the organization, that her management style was "rigid and inflexible," and that she was not "approachable."

Opt-in Plaintiff Robert Marsonette: Marsonette alleges, *inter alia,* that he was discriminatorily denied the Merriam Collection Process Manager position in 1995 because of his age. According to defendants, Marsonette was not selected for the position because of his "well-documented history of ineffective management and interpersonal relationships" and his limited educational background. In support of their position, defendants cite an incident in 1995 in which one of Marsonette's subordinates filed a sexual harassment complaint against him. As a result, Marsonette was counseled with respect to his "inappropriate and abrasive interpersonal style." This incident, according to defendants, further disqualified Marsonette for the Collection Process Manager position.

Plaintiff Gary A. Thiessen: Thiessen claims, *inter alia,* that he was discriminatorily denied the Arlington/Grand Prairie Remittance Processing Manager position in 1995 because of his age. According to defendants, Thiessen did not receive the position because he did not apply for it and because he lacked experience with sophisticated imaging technology. The successful candidate, Bret Plymire, had obtained experience with imaging technology prior to coming to MWC.

The foregoing examples are a mere prelude to what would most likely prove to be 23 individual jury trials to determine defendants' liability to each plaintiff. To proceed in a collective action with the defenses and circumstances surrounding each of the 23 plaintiffs and their respective claims is to defeat the purposes of a collective action. *See Hoffmann-La Roche Inc. v. Sperling,* 493 U.S. 165, 170 (1989) (identifying one benefit of a collective action as "efficient

resolution in one proceeding of common issues of law and fact arising from the same alleged . . . activity."). *See also Bayles*, 950 F. Supp. at 1067 ("[G]iven the number of individual issues that must be resolved, I am not persuaded that a single trial would save significant time or effort."). Simply put, consolidation of these claims into a collective action with the underlying defenses would not provide for an efficient proceeding for the resolution of what appears to be 23 distinct cases.

It may be argued that there is a common thread concerning the claims of each individual plaintiff (*i.e.*, the blocker policy) and, thus, collective treatment would avoid some repetition of evidence and argument. Despite the potential benefits of proceeding as a collective action, however, plaintiffs still must meet their burden of showing that they are similarly situated. In light of the defenses and unique circumstances surrounding each plaintiff and his or her claims, plaintiffs have not met this burden. Of course, this is particularly true because the plaintiffs have failed to come forward with sufficient evidence demonstrating a causal link between their individual claims and the blocker policy. In any event, the judicial inefficiencies described above clearly outweigh any potential benefits in proceeding as a collective action.

For the foregoing reasons, the court is convinced that individual issues would predominate at a trial of this action. Accordingly, bearing in mind the purposes of a collective action, the court determines that plaintiffs are not similarly situated within the meaning of § 216(b) and grants defendants' motion to decertify.

C. Trial Management Considerations

At the pretrial conference, following up on concerns set forth in its previous order with respect to trial management issues, the court requested that plaintiffs submit a proposed trial management plan in connection with their papers in opposition to defendants' motion to decertify and that

defendants then respond to plaintiffs' plan. According to plaintiffs' recommendation, Phase One of the trial would submit the pattern and practice allegations as well as the individual claims and damages of nine plaintiffs.[20] Specifically, plaintiffs suggest that

> [t]his trial will involve a determination of common class issues relating to the existence, implementation, and discriminatory nature of the Blocker Policy as well as class issues regarding wilfulness under the ADEA. In addition, because Defendants specifically identified these Plaintiffs as "blockers" in writing, or verbally, this phase of trial will also involve presentation of common evidence that each of these Plaintiffs were, in fact, designated and/or treated as "Blockers" by Defendants.
>
> Finally, this phase will involve a determination of the few easily manageable individual issues, including causation and damages, on the submissible claims of these nine Plaintiffs. The Parties should be able to try this Phase of the trial to a jury in two (2) weeks, plus a day or two.

If the jury determined that the blocker policy existed and that defendants had engaged in a pattern and practice of age discrimination, according to plaintiffs' proposed plan, then the same jury would then hear Phase Two of the trial, which would involve the remaining 14 plaintiffs.

The court agrees with defendants that plaintiffs' proposed trial management plan has numerous, serious deficiencies. In light of its determination, however, that the plaintiffs are not similarly situated for purposes of proceeding to trial as a collective action, the court need not address this issue at length. Suffice it to say, plaintiffs' plan renders individualized

---

[20] Plaintiffs suggest that the seven plaintiffs whose names appear on various versions of the blocker lists, as well as the two plaintiffs who were told that they had been designated as "blockers," be tried together.

consideration of the claims impossible and imposes extraordinary burdens on the jury, both in terms of the quantity of evidence and the length of trial.[21] In the end, the only viable and appropriate solution may well have been single-plaintiff trials, thereby defeating one of the benefits of proceeding as a collective action. In any event, the absence of any workable trial management plan only reinforces the court's decision to decertify this action.[22]

IV. Defendants' Motion for Summary Judgment with Respect to Mr. Thiessen's Individual Claims

Mr. Thiessen claims that defendants discriminated against him on the basis of his age and race in violation of the ADEA and Title VII. Specifically, Mr. Thiessen alleges that defendants failed to promote him on three separate occasions because of his age; phased him out of another position because of his age and race; and downgraded his performance reviews because of his age and race. Defendants move for summary judgment on each of Mr. Thiessen's claims. As set forth in more detail below, defendants' motion for summary judgment is granted.

A. Additional Facts Relevant to Mr. Thiessen's Claims

A brief review of Mr. Thiessen's employment history with defendants may be helpful. Plaintiff Gary A. Thiessen began his employment with Montgomery Ward in 1968 as a Credit

---

[21] Plaintiffs' estimate that Phase One would involve "a few easily manageable individual issues" and could be tried in two weeks is unrealistic in the court's experience.

[22] Defendants also maintain that various conflicts among members of the plaintiff group constitute a fourth reason for decertifying the action. *See Thiessen v. General Elec. Capital Corp.*, 996 F. Supp. 1071, at 1081 n.16 (D.Kan. 1998). Plaintiffs have not addressed this issue in their opposition papers. The court, however, declines to address this issue in light of its decision to decertify the action for independent reasons.

Manager Trainee. From 1972 to 1987, Mr. Thiessen was employed as a Walnut Creek New Account Supervisor; Collections Supervisor; and ultimately a Collection Manager. In 1987, Mr. Thiessen was promoted to Group Collection Manager and became a Band IV employee. Two years later, Mr. Thiessen was employed as a Walnut Creek Group Collections Manager; an Interim Business Center Manager; and a Grand Prairie Co-Business Center Manager. From March 1990 to July 1991, he held the position of Chicago Remittance Processing Center Manager.

In July 1991, Mr. Thiessen transferred to Hampton, Virginia to assist with the completion of the Hampton Recovery Unit construction. Soon thereafter, Mr. Thiessen assumed the Band IV position of National Attorney-Agency Manager, based out of Hampton. In this position, Mr. Thiessen reported to the Vice President of Recovery, who was initially Mike Case and then Mary Kinsey. In March 1993, Mary Kinsey told Mr. Thiessen that she wanted to "phase him out" of his National Attorney-Agency Manager position and groom Carlton Benton into the position. Mr. Benton was a younger, African-American employee. Ms. Kinsey indicated that she would like to phase Mr. Thiessen into a special projects position.

In January or February of 1994, Mr. Thiessen learned that the Hampton location was closing and relocating to Lenexa, Kansas. Mary Kinsey asked him to help with the relocation effort. When Mr. Thiessen asked whether he would get his old position back upon the completion of the Lenexa facility, Ms. Kinsey responded, "We'll see." Accordingly, in May 1994, Mr. Thiessen relocated to Kansas to oversee the build-out of the Lenexa facility.[23]

---

[23] Carlton Benton assumed Mr. Thiessen's duties as National Attorney-Agency Manager when Mr. Thiessen moved to Lenexa and eventually assumed the position itself.

In mid-1995, after the completion of the Hampton relocation effort, Joan Makura approached Mr. Thiessen and asked him to assist with the construction of a new remittance processing facility in Addison, Illinois, a suburb of Chicago. Ms. Makura believed that Mr. Thiessen had done a good job in Lenexa and felt that he would do well in Chicago. According to Mr. Thiessen, the Chicago project was a demotion in that Mr. Thiessen's earning and promotability potential were diminished. Nonetheless, Mr. Thiessen agreed to assist with the project. This assignment ended in or about December 1995.

From January to August 1996, Mr. Thiessen assisted with the construction of defendants' new Atlanta facility. At the completion of the project, Mr. Thiessen transferred to defendants' Las Vegas facility and assumed his present Band IV Collection Manager position. In his papers, however, Mr. Thiessen asserts that his position will be eliminated as of May 30, 1998 and that he is not allowed to post for any other positions within GE.

Mr. Thiessen filed his charge of discrimination with the EEOC on February 6, 1996 and his initial complaint on September 23, 1996. In both his EEOC charge and his complaint, Mr. Thiessen alleges that he has suffered age discrimination and/or race discrimination in connection with the employment actions described below. Specifically, Mr. Thiessen alleges that he was (1) denied the Las Vegas Business Center Manager position in 1993 because of his age; (2) "phased out" of his position as National Attorney-Agency Manager in 1994 because of his age and race; (3) downgraded on his 1993 and 1994 performance reviews because of his age and race; and (4) denied two Remittance Processing Manager

positions in 1995 because of his age.[24] Mr. Thiessen is Caucasian and fifty-one years old.

The 1993 Las Vegas Business Center Manager Position

In September 1993, defendant MWC posted the Las Vegas Business Center Manager position at MWC's Las Vegas facility. The job posting indicated a preference for candidates with a four-year college degree. The job posting also emphasized strategic skills and listed one of the position responsibilities as "provid[ing] strategic leadership in the design and implementation of the start-up center." Mr. Thiessen and Justin Boyle were among the candidates for the position. Jerry Glover, the individual responsible for filling the position, averred that Mr. Boyle was the most qualified candidate for the position. He based this conclusion on Mr. Boyle's educational accomplishments,[25] prior work experience, band level, broad-based strategic knowledge, and strategic and technical abilities. Moreover, Mr. Glover averred that he had supervised Mr. Thiessen in previous years and found Mr. Thiessen's experience ill-suited to the demands of the Las Vegas Business Center Manager position.

---

[24] Initially, Mr. Thiessen also claimed that he was denied a Vice President of Recovery position based on his age and that defendants discriminatorily altered one of his performance appraisals and delayed its delivery to him in retaliation for his filing an EEOC charge. In his papers, Mr. Thiessen expressly abandoned his claim with respect to the Vice President of Recovery position. Moreover, Mr. Thiessen failed to address the merits of his "altered appraisal" claim. Thus, the court grants defendants' motion for summary judgment with respect to these claims.

[25] Mr. Boyle had a college degree and an MBA in finance. Mr. Thiessen did not have a college degree.

Ultimately, Jerry Glover selected Justin Boyle for the position.[26]

Phase-Out of National Attorney-Agency Manager Position

In July 1991, Mr. Thiessen assumed the position of National Attorney-Agency Manager and, during the relevant time period, reported to Mary Kinsey, the Vice President of Recovery. In March 1993, Mary Kinsey told Mr. Thiessen that she wanted to "phase him out" of his National Attorney-Agency Manager position and groom Carlton Benton into the position. Mr. Benton was a younger, African-American employee. Ms. Kinsey indicated that she would like to phase Mr. Thiessen into a special projects position.[27]

In the first quarter of 1994, it was announced that defendants would relocate and consolidate the Hampton Recovery unit with its Kansas operation. This relocation and consolidation was designed to improve client service and marketing efforts, reduce costs, and minimize duplicative operations and assignments. Mary Kinsey asked Mr. Thiessen to help with the relocation effort.[28] Mr. Thiessen responded that "if that's what I can do to help, yes." When Mr. Thiessen asked whether he would get his old position back upon the

---

[26] In his papers, Mr. Thiessen provides great detail about his qualifications for the Las Vegas Business Center Manager position. The court has omitted many of these facts in light of its determination that Mr. Thiessen's claim with respect to this position is time-barred.

[27] In this same time frame, Mr. Thiessen had a conversation with Mary Kinsey's husband, Chris Kinsey. Mr. Kinsey, who was also employed by defendants, told Mr. Thiessen that "once you get special projects, that's the kiss of death."

[28] Mr. Thiessen believed that his performance overseeing the build-out of defendants' Hampton facility prompted Ms. Kinsey to utilize him for the Lenexa project.

completion of the Lenexa facility, Ms. Kinsey responded, "We'll see." Accordingly, Mr. Thiessen relocated to Kansas in May 1994 in order to build out the Lenexa facility and assist with various special projects associated with the Hampton relocation. Mr. Thiessen experienced no decrease in salary or band level as a result of this assignment. In fact, Mr. Thiessen received a $15,000 bonus for his efforts in 1994 and he was nominated for several awards.

During the time that Mr. Thiessen was in Kansas, Carlton Benton remained in Hampton and assumed acting responsibility for Mr. Thiessen's attorney-agency manager duties. Although Mr. Benton was supposed to report to Mr. Thiessen during this time, he apparently reported directly to Mary Kinsey. In September 1994, without notice to Mr. Theissen, Mr. Benton took over Mr. Thiessen's position as National Agency-Attorney Manager.

Improper Downgrading of Performance

Throughout his employment with defendants, Mr. Thiessen (like all defendants' employees) periodically received performance evaluations. Mary Kinsey completed Mr. Thiessen's 1993 and 1994 performance appraisals. Various criticisms of Mr. Thiessen's performance are made in these evaluations. According to the appraisals, however, Mr. Thiessen's overall performance for 1993 and 1994 met expectations.

The 1995 RPC Manager Positions

In June 1995, defendant MWC posted two Remittance Processing Center (RPC) Manager positions. One of these positions was located at defendants' Arlington/Grand Prairie facility. The other position was for a start-up facility to be located in Addison, Illinois. Although not specifically mentioned in the posting, these positions required the ability to utilize sophisticated imaging technology. The job postings indicated a preference for candidates with an MBA degree and

listed two of the positions' responsibilities as "develop, plan, and direct operation strategies," and "work to continually improve process, proactively set operational strategy, and position unit for growth."

Robert Mills was the manager to whom both of the RPC managers would report. Mr. Mills participated in both the interview process and the hiring decisions for both positions. According to Mr. Mills' affidavit, Mr. Thiessen was not interviewed for either position because he lacked the abilities and skills to successfully manage either site.[29] Specifically, Mr. Mills averred that Mr. Thiessen lacked imaging technology experience as well as remittance processing experience in an imaging environment.

Bret Plymire was selected for the Arlington/Grand Prairie RPC Manager position. Mr. Plymire had a college degree and approximately 10 years of remittance processing management experience, during the last several of which he managed a site utilizing imaging technology. Steve Pollack was selected for the Addison RPC Manager position. Mr. Pollack possessed a college degree in marketing and an MBA in finance. Moreover, Mr. Pollack had several years of remittance processing experience including recent experience with image payment processing.[30] Unlike the successful candidates, Mr. Thiessen did not have a college degree, had only eighteen

---

[29] Defendants maintain that Mr. Thiessen failed to apply for the Arlington/Grand Prairie position and failed to apply timely for the Addison position. Although Mr. Thiessen concedes that he did not submit a formal application for either position, he maintains that Robert Mills had sufficient and specific notice of his desire for such a position via a letter that Mr. Thiessen had sent to him in April 1995.

[30] According to Mr. Thiessen, however, the learning curve associated with imaging technology was very short. Moreover, Mr. Pollack needed an additional 30 days of training on imaging technology. Thus, Mr. Thiessen believes that he would have been able to achieve the same degree of proficiency with respect to imaging technology as Mr. Pollack.

months of remittance processing experience and did not have imaging processing experience.

B. Summary Judgment Standard

When considering a motion for summary judgment, the court must examine all of the evidence in the light most favorable to the nonmoving party. *Jones v. Unisys Corp.*, 54 F.3d 624, 628 (10th Cir. 1995). A moving party that also bears the burden of proof at trial is entitled to summary judgment only when the evidence indicates that no genuine issue of material fact exists. Fed. R. Civ. P. 56(c); *Anglemyer v. Hamilton County Hosp.*, 58 F.3d 533, 536 (10th Cir. 1995). If the moving party does not bear the burden of proof at trial, it must show "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

Once the movant meets these requirements, the burden shifts to the party resisting the motion to "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The nonmovant may not merely rest on the pleadings to meet this burden. *Id.* Genuine factual issues must exist that "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250. Summary judgment is not a "disfavored procedural shortcut;" rather, it is an important procedure "designed to secure the just, speedy and inexpensive determination of every action." *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

C. Procedural Considerations

Defendants move for summary judgment on three of Mr. Thiessen's claims (*i.e.*, his 1993 failure-to-promote claim; his "phase-out" claim; and his downgraded performance claim) on the grounds that these claims are time-barred. Specifically, defendants contend that the alleged discriminatory acts underlying these claims occurred well

outside the limitations period. In response, Mr. Thiessen maintains that these claims are sufficiently related to events occurring within the time limitations period and, thus, constitute a "continuing course of conduct." As set forth in more detail below, the court concludes that an application of the continuing violation theory is not appropriate in this case. Thus, Mr. Thiessen's claims that he was (1) denied the 1993 Las Vegas Business Center Manager position based on his age; (2) "phased out" of his National Attorney-Agency Manager position based on his age and race; and (3) downgraded on his performance evaluations based on his age and race are time-barred. As such, the court grants defendants' motion for summary judgment with respect to these claims.

In a deferral state like Kansas, a plaintiff asserting a claim under the ADEA or Title VII must file an administrative charge within 300 days after the alleged discriminatory act occurred. *See* 29 U.S.C. § 626(d); 42 U.S.C. § 2000e-5(e)(1). This filing is a prerequisite to a civil suit under Title VII and the ADEA. *Martin v. Nannie & the Newborns, Inc.*, 3 F.3d 1410, 1414 (10th Cir. 1993) (Title VII); *Bruno v. Western Elec. Co.*, 829 F.2d 957, 960 (10th Cir. 1987) (ADEA). Mr. Thiessen filed his administrative charge on February 6, 1996. Thus, according to defendants, only those claims arising after April 11, 1995 (300 days prior to the filing of Mr. Thiessen's charge) are properly considered by the court. Mr. Thiessen may recover for discriminatory acts occurring prior to the statutory limitations period, however, if at least one instance of the discriminatory practice occurs within the filing period and the earlier acts are "part of a continuing policy or practice that includes the act or acts within the statutory period." *See Mascheroni v. Board of Regents*, 28 F.3d 1554, 1561 (10th Cir. 1994) (quoting *Nannie & the Newborns*, 3 F.3d at 1415).

Under the continuing violation theory, a plaintiff has satisfied the filing requirements when he or she shows a

continuing policy and practice that operated within the statutory filing period. *Bruno,* 829 F.2d at 960. When the policy and practice is company-wide, the plaintiff can show that a violation occurred within the statutory period by showing some application of the policy within that period. *Id.* at 961 (citing *Furr v. AT & T Technologies, Inc.,* 824 F.2d 1537, 1543 (10th Cir. 1987)). If, however, the defendant can show that the policy was discontinued before the limitations period, then the plaintiff's claim must be dismissed as a matter of law. *Id.*

Mr. Thiessen has not produced sufficient evidence for a reasonable factfinder to conclude that an application of the policy occurred within the limitations period. The only specific alleged discriminatory acts that occurred within the limitations period are the denial of the Addison RPC Manager position and the denial of the Arlington/Grand Prairie RPC Manager position. With respect to both of these positions, Robert Mills determined that other individuals were more qualified than Mr. Thiessen for the positions. Mr. Mills averred that he had never been asked to implement any so-called "blocker policy," and that he had never taken any adverse employment action pursuant to any so-called "blocker policy" or concept. Furthermore, there is no evidence in the record that Mr. Mills attended any of the meetings during which the blocker policy was discussed or that Mr. Mills had any knowledge of Mr. Thiessen's "blocker" status.

Moreover, the record reveals that the alleged blocker policy was discontinued prior to the start of the limitations period. Specifically, it is uncontroverted that Steve Joyce and Jeff Faucette, the individuals who launched the blocker concept in the early 1990's, were not even employed by defendant MWC at the start of the limitations period. In addition, Gail Lanik, defendant MWC's president and CEO, publicly repudiated the

blocker concept in the fall of 1994.[31] Even Mr. Thiessen's chronology of events with respect to the blocker policy culminates in 1994. *See* Plaintiff's Brief in Opposition at pp. 31-34.

Finally, the Tenth Circuit has cautioned that the "continuing violation doctrine is premised on the equitable notion that the statute of limitations should not begin to run until a reasonable person would be aware that his or her rights have been violated." *Nannie & the Newborns,* 3 F.3d at 1415 n.6. Consistent with this principle, the Circuit has restricted the operation of the continuing violation doctrine "to those situations underscored by its equitable foundation." *Id.* In other words, "if an event or series of events should have alerted a reasonable person to act to assert his or her rights at the time of the violation, the victim cannot later rely on the continuing violation doctrine." *Id.*

Significantly, Mr. Thiessen admitted that he first heard about the blocker list in late 1993 or early 1994 and, in fact, even heard that his name was on the blocker list.[32] Mr. Thiessen's knowledge of the alleged blocker list, even if he was uncertain whether the list actually existed or whether his name appeared on the list, should have alerted him of the possibility that his rights were violated when he was denied the Las Vegas Business Center Manager position in 1993,

---

[31] Mr. Thiessen makes a passing effort to controvert Lanik's repudiation of the blocker concept. Specifically, Mr. Thiessen cites to the affidavit of Rick Richards, a former employee of defendants. According to Richards, he received an unexpected telephone call from Lanik in May 1994 who informed him that she had "exciting news"—she had prepared her organizational chart and Richards was not on it. Lanik then advised Richards that he had three days to accept an early retirement package. This isolated example, without any factual context, simply does not suggest that Lanik did not repudiate the blocker concept in the fall of 1994.

[32] Mr. Thiessen testified that he "dismissed" the report that his name was on the blocker list because he had not actually seen the list.

phased out of the National Attorney-Agency Manager position in 1994, and downgraded on his performance evaluations in both years. *See Hulsey v. Kmart, Inc.*, 43 F.3d 555, 557-58 (10th Cir. 1994) (rejecting plaintiffs' equitable tolling argument that their ADEA causes of action did not accrue when they were given the challenged demotions and transfers, but only when their suspicions of age discrimination were aroused by watching a television program, "A Current Affair.").

In sum, the court concludes that Mr. Thiessen has failed to set forth sufficient facts to raise a triable issue on whether defendants engaged in a continuing course of discrimination such that the court should consider the incidents that occurred prior to the 300-day filing limitations period. Accordingly, the court grants defendants' motion for summary judgment with respect to Mr. Thiessen's 1993 failure-to-promote claim, "phase out" claim, and downgraded performance claim.

D. Substantive Considerations

Having determined that three of Mr. Thiessen's claims are time-barred, the court addresses whether Mr. Thiessen has met his burden on summary judgment with respect to his remaining claims—the denial of two RPC manager-positions in 1995. Mr. Thiessen contends that defendants denied him these positions on the basis of his age. As set forth in more detail below, the court concludes that Mr. Thiessen has failed to produce evidence from which a reasonable factfinder could conclude that defendants' proffered explanations for its actions were "unworthy of credence." Thus, the court grants summary judgment in favor of defendants' on Mr. Thiessen's remaining age discrimination claims.

The court analyzes Mr. Thiessen's claims under the familiar burden-shifting framework first pronounced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). *See Marx v. Schnuck Markets, Inc.*, 76 F.3d 324, 327 (10th Cir. 1996). In the summary judgment context, plaintiff initially

must raise a genuine issue of material fact on each element of his prima facie case of discrimination. *See id.* Once plaintiff establishes his prima facie case, the burden shifts to defendant to offer a legitimate, nondiscriminatory reason for its employment decision. *Id.* (citing *Randle v. City of Aurora,* 69 F.3d 441, 451 (10th Cir. 1995)). If the defendant comes forward with a nondiscriminatory reason for its actions, the burden then reverts to the plaintiff "to show that there is a genuine dispute of material fact as to whether the employer's proffered reason for the challenged action is pretextual—i.e., unworthy of belief." *Id.* (quoting *Randle,* 69 F.3d at 451). If the plaintiff proffers such evidence, the motion for summary judgment must be denied. *Id.* (quoting *Randle,* 69 F.3d at 452 n.17).

To establish a prima facie case in the failure-to-promote context, Mr. Thiessen must show "that there were promotional opportunities available that were filled by [younger persons], that [he] was qualified for promotion, and that despite [his] qualifications [he] was not promoted." *Sprague v. Thorn Americas, Inc.,* 129 F.3d 1355, 1362 (10th Cir. 1997) (Title VII). According to defendants, Mr. Thiessen cannot establish a prima facie case, at least with respect to the Arlington/Grand Prairie position, because he admits that he did not apply for the position. *See Bauer v. Bailar,* 647 F.2d 1037, 1044 (10th Cir. 1981) (plaintiff "must prove that she applied for an available position for which she was qualified" in order to establish prima facie case) (quoting *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248 (1981)); *Montgomery v. Card,* 794 F. Supp. 1066, 1067 (D.Kan. 1992) (same). As Mr. Thiessen points out, however, the "law does not require that a plaintiff formally apply for the job in question." *Whalen v. Unit Rig, Inc.,* 974 F.2d 1248, 1251 (10th Cir. 1992). Rather, "the law requires either that the employer be on specific notice that the plaintiff seeks employment or, where informal hiring procedures are used, that the plaintiff be in the group of people who might reasonably be interested in the

particular job." *Id.* (citing *Carmichael v. Birmingham Saw Works,* 738 F.2d 1126, 1133 (11th Cir. 1984); *Grant v. Bethlehem Steel Corp.,* 635 F.2d 1007, 1017 (2d Cir. 1980)).

In April 1995, Mr. Thiessen sent a memorandum to Robert Mills regarding "RPC—Chicago" in which he expressly stated that "he would like to be considered as a candidate to manage the new facility in Chicago." Although Mr. Thiessen may have been referring to the new Addison facility, a reasonable jury could conclude that Mr. Mills, the individual responsible for filling the Arlington/Grand Prairie position, had specific notice that Mr. Thiessen was interested in the Arlington/Grand Prairie position. This is particularly true in that Mr. Thiessen sent the memorandum just weeks before defendants posted the Arlington/Grand Prairie position. Thus, the court concludes that Mr. Thiessen has adequately established his prima facie case of age discrimination.[33]

Nonetheless, Mr. Thiessen has failed to raise any inference of pretext. Defendants have come forward with legitimate, nondiscriminatory reasons for selecting other candidates for the positions. According to defendants, Bret Plymire was selected for the Arlington/Grand Prairie position because he had a college degree and 10 years of remittance processing management experience, during the last several of which he managed a site utilizing sophisticated imaging technology. Similarly, according to defendants, Steve Pollack was selected for the Addison position because he had a college degree in marketing, an MBA in finance, several years of remittance processing experience, and recent experience with image

---

[33] Apparently, Mr. Thiessen did not formally apply for the Arlington/Grand Prairie position because he was not aware that the position had been posted. At the time defendants posted the position, Mr. Thiessen was traveling for defendants and did not have access to a laptop computer. According to Mr. Thiessen, his repeated requests for a laptop computer, which would have allowed him to stay updated on the electronic job postings, were denied.

payment processing technology. Mr. Thiessen, on the other hand, did not have a college degree and had managed a remittance processing center for only 18 months. Moreover, according to defendants, Mr. Thiessen lacked imaging technology experience.

In an effort to show that defendants' proffered reasons are pretextual, Mr. Thiessen first asserts that he was more qualified than the individuals selected for the positions. He maintains, for example, that he had many years of management experience with specific experience in remittance processing. He also argues that the "learning curve" associated with imaging technology was very short, apparently suggesting that his lack of experience with imaging technology should not have been a factor in defendants' decision.[34] Finally, Mr. Thiessen points out that Steve Pollack, the individual selected for the Addison position, needed an additional 30 days of training with respect to imaging technology. According to Mr. Thiessen, he could

---

[34] Mr. Thiessen also argues that imaging technology experience was not listed as a requirement in the position posting. In some circumstances, an employer's use of selection criteria not previously disclosed to the applicant may give rise to an inference of pretext. *See, e.g., Corneveaux v. Cuna Mut. Ins. Group,* 76 F.3d 1498, 1503 (10th Cir. 1996) (defendant's claim that plaintiff was not qualified for position because she did not possess sales experience or a sales license was sufficient to give rise to inference of pretext where there was no indication of the need for a sale license in anything previously told to her, in the job description, or in any company policy; employer hired someone for same position six months earlier who did not have sales license; and plaintiff showed that the position itself did not involve sales). *See also Randle v. City of Aurora,* 69 F.3d 441, 453 (10th Cir. 1995) (defendant's claim that plaintiff was not qualified for the position because she lacked an Associate's degree sufficient to give rise to inference of pretext where requirement was not a genuine prerequisite for the position). Significantly, however, Mr. Thiessen concedes in his deposition that imaging technology was in fact utilized in the position and it is uncontroverted that the successful candidate possessed such experience.

have taken the same training and achieved the same degree of proficiency with imaging technology.[35]

These assertions, however, are insufficient to create an inference that defendants' reasons for selecting Mr. Thiessen for the positions were a pretext for age discrimination. *See Fallis v. Kerr-McGee Corp.*, 944 F.2d 743, 747 (10th Cir. 1991) (plaintiff's assertions that he was a better qualified geologist than younger geologists retained during RIF does not permit conclusion that defendant's evaluation of plaintiff's performance or qualifications was a pretext for age discrimination); *Branson v. Price River Coal Co.*, 853 F.2d 768, 772 (10th Cir. 1988) (plaintiff's assertions that she was in fact equally or more qualified than the individuals retained during RIF insufficient to support finding of pretext in age discrimination case). Mr. Thiessen's own perceptions with respect to his qualifications for the positions are irrelevant;

---

[35] Mr. Thiessen also suggests in his response to defendants' statement of uncontroverted facts that defendants' reliance on Mr. Pollack and Mr. Plymire's educational background (and, by implication, Mr. Thiessen's lack of a college degree) is a pretext for discrimination because the positions did not require an advanced degree; rather, the job postings merely expressed a preference for advanced degrees. The Tenth Circuit, however, has recognized that an employer's reliance on superior educational credentials in making employment decisions does not give rise to an inference of pretext. *See Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1458 (10th Cir. 1994) (no inference that defendant's proffered reasons for selecting plaintiff for layoff were pretextual where lower-ranking younger employee possessed college degree and plaintiff did not) (citing *Barnes v. GenCorp Inc.*, 896 F.2d 1457, 1471 (6th Cir. 1990) (employer entitled to rely on superior educational credentials in retaining more qualified younger employee over older employee with more seniority)). Of course, in certain circumstances not present here, an employer's purported reliance on educational credentials may give rise to an inference of pretext. *See, e.g., Randle v. City of Aurora*, 69 F.3d 441, 453-54 (10th Cir. 1995) (defendant's claim that plaintiff was not qualified for position because she did not possess Associate's degree was sufficient to give rise to inference of pretext where defendant had both previously and subsequently treated the requirement as unnecessary).

rather, it is the perception of the decisionmaker which is relevant. *See Furr v. Seagate Technology, Inc.*, 82 F.3d 980, 988 (10th Cir. 1996) ("It is the manager's perception of the employee's performance that is relevant, not plaintiff's subjective evaluation of his own relative performance.") (citing *Branson*, 853 F.2d at 772 (citing *Smith v. Flax*, 618 F.2d 1062, 1067 (4th Cir. 1980))).[36] Robert Mills, a key decisionmaker with respect to both the Arlington/Grand Prairie position and the Addison position, perceived Mr. Thiessen as less qualified than other candidates. Specifically, Mr. Mills averred that Mr. Thiessen was not interviewed for either position because he lacked the abilities and skills to successfully manage either site (*e.g.*, he lacked imaging technology experience, remittance processing experience in an imaging environment, and a college degree). In such circumstances, Mr. Thiessen's assertions that he was more qualified than the successful candidates, without more, are insufficient to create an inference that defendants' proffered reasons for not selecting Mr. Thiessen for either position are pretextual.

Mr. Thiessen's only other "pretext" evidence is that he was listed by defendants as a "blocker" and, thus, was specifically identified as someone who was blocking the advancement of younger "high potential" employees, including Bret Plymire and Steve Pollack.[37] This evidence, however, is insufficient

---

[36] Of course, courts will not always simply rely on an employer's assertion that it selected the most qualified candidate. *See, e.g., Randle v. City of Aurora*, 69 F.3d 441, 454 (10th Cir. 1995) (plaintiff withstands summary judgment on failure-to-promote claim despite City's contention that it hired the most qualified applicant where plaintiff presented evidence of pretext in hiring decision and City failed to fire successful candidate after it discovered candidate misrepresented her qualifications).

[37] Although Mr. Thiessen does not specifically allege that Bret Plymire or Steve Pollack were identified as younger, "high potential" employees, the court assumes for purposes of this motion that these individuals were

to demonstrate pretext because Mr. Thiessen has failed to demonstrate any connection between his "blocker" status and defendants' decision to select other candidates for the RPC Manager positions. *See Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1457 (10th Cir. 1994) (no inference of pretext where plaintiff failed to connect memos outlining hidden policy of purported age discrimination "in any meaningful way" to her layoff). *Cf. Bolton v. Scrivner, Inc.*, 36 F.3d 939, 944 (10th Cir. 1994) (comments by plaintiff's supervisor that plaintiff was an "old fart" does not show pretext because plaintiff failed to demonstrate a nexus between those comments and defendant's decision not to rehire him); *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 531 (10th Cir. 1994) (discriminatory statements are "insufficient to create a jury issue in an ADEA case" unless linked to relevant personnel action).

There is simply no evidence in the record that Mr. Thiessen's "blocker" status or defendants' alleged blocker policy had any bearing on the decision to select other candidates for the RPC Manager positions. Significantly, Steve Joyce and Jeff Faucette, the two primary proponents of the blocker policy, left the employment of MWC in early 1994. Clearly, they had no involvement in the two challenged 1995 promotion decisions (and, in fact, Mr. Thiessen does not allege that they had any involvement in the promotion decisions). Robert Mills, the individual involved in the promotion decisions, averred that he had never been asked to implement any blocker policy and that he had never taken any adverse employment action pursuant to any blocker policy. *Cf. Eslinger v. U.S. Central Credit Union*, 866 F. Supp. 491, 498 (D.Kan. 1994) (sufficient showing of discriminatory intent where alleged remarks were made by the same individual who ordered the challenged employment action).

---

younger, "high potential" employees.

Moreover, there is no suggestion (and Mr. Thiessen does not allege) that Mr. Mills was present at any meetings during which the blocker concept was discussed or that he had any knowledge of Mr. Thiessen's blocker status. Finally, several witnesses testified that Gail Lanik publicly and unequivocally repudiated the blocker concept in the fall of 1994. Although Mr. Thiessen attempts to dispute this fact, even his "blocker" chronology ends in 1994.

In support of his argument that his "blocker" status is sufficient to create an inference of pretext, Mr. Thiessen directs the court to the Tenth Circuit's opinion in *Whalen v. Unit Rig, Inc.*, 974 F.2d 1248 (10th Cir. 1992).[38] The *Whalen* decision, however, is distinguishable and, in any event, is consistent with the court's holding today. In *Whalen,* the plaintiff filed an age discrimination suit against defendants' based on their failure to hire him after a corporate acquisition. 974 F.2d at 1250. Evidence was introduced at trial that the decisionmakers had requested lists of employees in declining order of age and that these lists were delivered to the decisionmakers at the time the challenged employment decision was made. On appeal, the Tenth Circuit found that the decisionmakers' request for employee lists in declining order of age (and the delivery of those lists) at the time the employment decision was made, along with other evidence, was susceptible to the reasonable inference that the plaintiff's age was a determining factor in defendants' actions and that defendants' proffered explanations were pretextual. *Id.*

Mr. Thiessen maintains that the *Whalen* case is significant (and analogous to this case) because the Tenth Circuit found that the employee lists could support an inference of pretext despite the absence of any evidence of a specific link between defendants' failure to hire Mr. Whalen and any actual use of

---

[38] The relevant facts of the *Whalen* decision are set forth in more detail in section III.A.1 of this opinion.

the employee list. Thus, according to Mr. Thiessen, the "ultimate resolution of the nexus between defendants' discriminatory Blocker policy and plaintiff's claims is properly for the jury." *See id.* at 1253 ("Resolving the factual dispute over whether the lists were used for employment decisions would properly be a matter for the jury.").

Contrary to Mr. Thiessen's belief, the *Whalen* decision is entirely consistent with the court's determination that his "blocker" status is insufficient to create an inference of pretext in the absence of any evidence of a link between his blocker status and defendants' decision not to select him for the RPC Manager positions. In *Whalen,* the decisionmakers requested and received the employee list at the very time they were making the challenged employment actions. Here, there is no indication (and Mr. Thiessen does not allege) that the decisionmaker, Robert Mills, had any knowledge of the blocker lists or whether Mr. Thiessen had been designated as a "blocker." Moreover, the challenged decisions here occurred at least two years after the formulation of the blocker list and long after Gail Lanik repudiated the blocker policy or concept. In essence, other than his bare allegations that he was not selected for either position based on his "blocker" status, Mr. Thiessen has presented no evidence that the blocker policy or concept carried over into 1995. The mere fact that Mr. Thiessen was not selected for the RPC Manager positions after having been designated a "blocker," without more, simply does not support an inference that a causal connection existed between Mr. Thiessen's blocker status and the challenged employment decisions where a significant time lag exists between the two events. *Cf. Conner v. Schnuck Markets, Inc.,* 121 F.3d 1390, 1395 (10th Cir. 1997) (unless the employer's adverse action "is very closely connected in time to the protected conduct, the plaintiff will need to rely on additional evidence beyond mere temporal proximity to establish causation"; four-month time lag between plaintiff's protected activity and his termination, without more, is

insufficient to justify an inference of causation); *Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997) (three-month period between plaintiffs' protected activity and her termination, standing alone, does not demonstrate a causal connection); *Redmond v. Day & Zimmerman, Inc.*, 897 F. Supp. 1380, 1386 (D.Kan. 1995) (no inference of causal connection where defendant terminated plaintiff's employment more than three years after plaintiff filed initial charge of discrimination) (citing *Burrus v. United Tel. Co.*, 683 F.2d 339, 343 (10th Cir. 1982) (plaintiffs failed to establish prima facie case of retaliation where three years passed between the filing of her charges and her termination)), *aff'd*, 85 F.3d 641 (10th Cir. 1996).

In the absence of any nexus between Mr. Thiessen's "blocker" status and the challenged promotion decisions, Mr. Thiessen's "blocker" evidence is insufficient to show that defendants' proffered reasons for selecting other candidates for the RPC Manager positions were pretextual. Accordingly, the court grants defendants' motion for summary judgment on Mr. Thiessen's remaining claims of age discrimination.

IT IS THEREFORE ORDERED BY THE COURT THAT defendants' motion to decertify the collective action (doc. # 319) is **granted**. The court dismisses the opt-in plaintiffs Gene Autry; Pamela S. Chudyba; Gwen Colwell; Barbara A. Croy; Jan L. Cullison; Robert DeMartine; James C. Flower; Lawrence P. Fries; Terry M. Grisham; Elaine Hayden; Melva Heid; Linda L. Hess; Christopher P. Kaesberg; James Lawson; Brenda Lewis; Robert Marsonette; Ray Osburn; Kimberly Perron; Diana Polsinelli; Patricia Serra; Salli J. Shirey; and Janice F. Trice. Accordingly, defendants' motions for summary judgment with respect to each of the opt-in plaintiffs (docs. # 325, 327, 329, 331, 333, 335, 337, 339, 341, 343, 345, 347, 349, 351, 353, 355, 357, 359, 361, 363, 365 and 369) are **moot**.

IT IS FURTHER ORDERED BY THE COURT THAT defendant GECC's motion for summary judgment on the claims of non-employee plaintiffs (doc. # 371) is **moot.**

IT IS FURTHER ORDERED BY THE COURT THAT defendants' motion for summary judgment as to plaintiff Gary A. Thiessen's claims (doc. # 367) is **granted.**

IT IS FURTHER ORDERED BY THE COURT THAT plaintiffs' motion to modify the pretrial order (doc. # 374) is **denied as moot.**

IT IS SO ORDERED.

**UNITED STATES DISTRICT COURT,
FOR THE DISTRICT OF KANSAS.**

Gary A. THIESSEN, Plaintiff,
v.
GENERAL ELECTRIC CAPITAL CORPORATION, d/b/a GE Capital, and Montgomery Ward Credit Services, Inc., f/k/a Monogram Retailer Credit Services, Inc.
Defendants.

No. 96-2410-JWL.

Feb. 5, 1998.
Order Denying Motion
March 11, 1998.

MEMORANDUM AND ORDER

LUNGSTRUM, District Judge.

This matter is presently before the court on plaintiff's motion to join additional parties as plaintiffs and to certify the action as a collective action under the Age Discrimination in Employment Act (ADEA) pursuant to 29 U.S.C. § 216(b) (Doc. # 215). The court conducted a hearing on the motion on January 26, 1998. Having carefully considered the parties' papers and their oral presentations, the court is prepared to rule. For the reasons set forth below, plaintiff's motion is granted in part and denied in part, subject to further review of the certification issue in connection with any motion to decertify.[1]

---

[1] As set forth in the court's amended scheduling order, any dispositive motions, including motions to decertify, shall be filed on or before April 3, 1998.

I. Procedural History

After exhausting administrative prerequisites, plaintiff Gary Thiessen filed a complaint on September 23, 1996 alleging violations of the ADEA arising out of his employment with defendants.[2] On May 2, 1997, the court held a scheduling conference during which counsel for Mr. Thiessen announced their intention to send notices to potential plaintiffs for purposes of proceeding as a collective action under § 216(b).[3]

Accordingly, the court established a deadline of August 1, 1997 for potential plaintiffs to file "opt-in" request forms. A total of thirty individuals elected to opt-in to the action and filed the requisite consent forms. The parties have engaged in considerable discovery both on the merits and on the issue of the appropriate composition of the proposed plaintiff group.

Mr. Thiessen now moves the court to join the opt-in plaintiffs and certify the action as a collective action under 29 U.S.C. § 216(b). Counsel for Mr. Thiessen did not seek conditional certification of the proposed group prior to sending out notice to potential plaintiffs. Thus, Mr. Thiessen's motion marks the first opportunity the court has had to address the certification issue.

---

[2] Mr. Thiessen also alleges violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (Title VII). Because this claim is not relevant to Mr. Thiessen's motion, the court will not discuss it.

[3] The ADEA incorporates the procedures for enforcement of the Fair Labor Standards Act (FLSA). 29 U.S.C. § 626(b). A class action under the ADEA is therefore governed by § 16(b) of the FLSA found at 29 U.S.C. § 216(b) rather than Rule 23 of the Federal Rules of Civil Procedure. Section 16(b) provides that an action may be brought by an employee for himself or herself and on behalf of "other employees similarly situated." An employee similarly situated does not become a party-plaintiff under § 16(b) "unless he gives his consent in writing to become such a party" and files consent in the court where the action is pending. 29 U.S.C. § 216(b).

II. Background

Mr. Thiessen has been an employee of defendants for nearly thirty years.[4] He is fifty years old. After defendants allegedly denied Mr. Thiessen a series of promotions, Mr. Thiessen filed a charge of discrimination with the EEOC and the Kansas Human Rights Commission alleging violations of the ADEA. In his charge, Mr. Thiessen detailed the circumstances surrounding the promotions at issue. In addition, Mr. Thiessen alleged company-wide discrimination based on age:

> Employment decisions at GE Capital for persons similarly situated to me show a "stark pattern" unexplainable on grounds other than age. . . . GE Capital has a well-established history of "early-outing" or attempting to "early-out" older white executives at or near my level. Further, the company has an express but covert policy of discriminating against older white employees. Older white employees who are performing at a level which meets or exceeds objective expectations are identified as "White blockers" or "blockers." They are called "Blockers" because their continued employment "blocks" the promotion of younger . . . "high potential" employees. The company's policy is to force the older white employees into early retirement or to eliminate the employee's position through restructuring.

In his charge, Mr. Thiessen also alleged that "GE Capital has a pattern and practice of removing employees identified as 'Blockers' from their positions."

On September 23, 1996, Mr. Thiessen filed a complaint alleging violations of the ADEA. In May of 1997, Mr. Thiessen sent notice of the action to potential plaintiffs for the purpose of proceeding as a collective action under

---

[4] Mr. Thiessen is currently employed by defendants.

§ 216(b). The notice invited individuals who met the following criteria to opt- in to the action:

(1) 40 years of age or older;

(2) employed by General Electric Capital Credit, Montgomery Wards Credit Services or Monogram Retail Credit Services, Inc. (MRCSI);

(3) members of the salaried exempt work force as either a Band III, IV or V employee; and

(4) involuntarily discharged, laid off, terminated, downgraded, demoted, denied advancement opportunities or forced to retire from employment by General Electric Company.

A total of thirty individuals elected to opt-in to the action and filed the requisite consent forms.[5] Mr. Thiessen seeks to join all thirty opt-in plaintiffs and to proceed as a collective action under § 216(b).

Discovery has revealed significant differences among the thirty opt-in plaintiffs, both in terms of employment situation and alleged discriminatory treatment. The opt-in plaintiff group consists of individuals who have held dozens of different positions (each with different requirements and responsibilities) across seven states.[6] They range in age from approximately 45 to 60 years old and range in tenure from 4 years to 31 years. They have been supervised by many different individuals. In addition, the opt-in plaintiffs represent three of the five salary grades, with a salary range of approximately $25,000 to $75,000.

---

[5] Because counsel for Mr. Thiessen did not seek conditional certification from the court prior to sending out notice of the action, the court played no part in tailoring the proposed group.

[6] The opt-in plaintiffs are either current or former employees of defendants in Kansas, Virginia, Texas, Georgia, Illinois, California or Nevada.

Finally, and perhaps most significantly, the opt-in plaintiffs allege widely varying adverse employment actions spanning nearly ten years. The challenged employment actions range from failure to promote, failure to transfer, layoff and constructive discharge to downgraded performance evaluations and discrimination in job assignments and training. According to the defendants, the thirty opt-in plaintiffs dispute over two hundred separate employment actions.

In support of his motion, however, Mr. Thiessen alleges an overall policy of defendants to rid the company of older workers. In support of this allegation, Mr. Thiessen relies on a series of documents referring to "blockers" and a "blocker" program allegedly implemented by top executives in defendants' corporate hierarchy.[7] According to Mr. Thiessen, this "blocker" program targeted older employees regardless of location, job position, salary or any other factor other than age.

Thus, Mr. Thiessen contends, the opt-in plaintiffs are "similarly situated" for purposes of § 216(b) in that each opt-in plaintiff has been adversely affected by a company-wide policy of age discrimination (*i.e.*, the "blocker" program). Defendants vigorously deny the existence of any policy or plan of age discrimination and further contend that the "blocker" program is insufficient to render the opt-in plaintiffs "similarly situated" as required by § 216(b).

---

[7] One document, for example, is an outline of discussion topics for a meeting attended by defendants' Human Resources managers in June 1993. The outline is entitled "Reorganization Strategy—Potential 'Blockers' " and includes topics such as "Identification of Blockers" and "Time Line of Removing Blockers." According to the document, one objective of the "reorganization strategy" is to "provide opportunities for internal high potential leadership."

III. The "Single Filing" Rule

Before bringing a civil action under the ADEA, a plaintiff must have filed a timely charge of age discrimination with the EEOC. 29 U.S.C. § 626(d).[8] The purpose of this filing requirement is to give the EEOC an opportunity to resolve the dispute through conciliation and to give notice of the alleged violation to the defendant. *Id.; Ingels v. Thiokol Corp.*, 42 F.3d 616, 625 (10th Cir. 1994). In appropriate circumstances, however, most courts permit similarly situated individuals to join the action of a plaintiff even though the individual has not filed his or her own EEOC charge, so long as at least one plaintiff has complied with the filing requirements of § 626(d). *See, e.g., Mistretta v. Sandia Corp.*, 639 F.2d 588, 593-94 (10th Cir. 1980). This is commonly referred to as the "single filing" rule.[9]

Although defendants concede the viability of the single-filing rule in appropriate circumstances, they contend that such circumstances are not present here. Specifically, defendants maintain the single-filing rule should not apply to the opt-in plaintiffs for the following reasons: (1)

---

[8] The charge-filing requirement of the ADEA reads:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—
>
> (1) within 180 days after the alleged unlawful practice has occurred; or
>
> (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under state law, whichever is earlier.
>
> 29 U.S.C. § 626(d).

[9] Mr. Thiessen filed a charge of discrimination with the EEOC on February 2, 1996. None of the opt-in plaintiffs filed charges of discrimination.

Mr. Thiessen's charge of discrimination was insufficient to put either the EEOC or defendants on notice of potential class claims; (2) the single-filing rule only applies to those opt-in plaintiffs who could have filed timely charges of discrimination on the date Mr. Thiessen actually filed his charge; and (3) the claims of the opt-in plaintiffs are beyond the scope of Mr. Thiessen's charge. Each of these arguments is addressed below.

A. The Notice Requirement

Defendants urge that Mr. Thiessen's charge of discrimination is insufficient to satisfy the notice requirements of § 626(d) on behalf of the thirty opt-in plaintiffs. The court disagrees. After carefully reviewing Mr. Thiessen's charge of discrimination, the court finds the charge sufficient to give notice of potential class claims against defendants.

In order for individuals in a collective action to invoke the single-filing rule, the filed charge must contain an allegation of class-wide discrimination sufficient to give the defendants notice of potential class claims. *See Mistretta,* 639 F.2d at 593-94 (holding notice requirements of § 626(d) were satisfied on behalf of similarly situated opt-in plaintiffs where timely notice had been given for the group).

In *Mistretta,* only two plaintiffs in the § 216(b) action filed charges of discrimination with the EEOC and the appropriate state agency. *Id.* at 593. In analyzing whether the notice requirements of § 626(d) had been satisfied as to the remaining opt-in plaintiffs, the Court reasoned:

> The recipients were notified that the suit was intended to be a class action for all employees or former employees of Sandia who were between the ages of 40 and 65. The formal charges were alleged to have been filed for the individual complainants and all others similarly situated. *The allegation was that Sandia's "arbitrary action constitutes age discrimination against workers over 40,"* a

> notice which notified the New Mexico Human Rights Commission so that it had opportunity to investigate and to act within the statutory time limitation.

Id. at 595 (emphasis added). The Tenth Circuit concluded that the charge was adequate to satisfy the notice requirement. *Id.*

In reaching its decision, the court recognized that the ADEA is "a remedial statute that is to be liberally construed" and "that it should be read in such a manner as to give full recognition to that remedial character." *Id.* at 593-94 n.3 (quoting *Bean v. Crocker Nat'l Bank,* 600 F.2d 754, 759 (9th Cir. 1979)(quoting *Oscar Mayer & Co. v. Evans,* 441 U.S. 750, 764 (1979) (Blackmun, J., concurring))). The court continued:

> The ADEA's broad remedial purposes of prohibiting arbitrary age discrimination and of promoting the employment of older persons based on their ability rather than age are best served by an interpretation of 29 U.S.C. § 216(b) that permits similarly situated complainants to join in an action as unnamed parties so long as a named plaintiff has complied with the notice requirements of 29 U.S.C. § 626(d).

Id. (quoting *Bean,* 600 F.2d at 759).

Defendants interpret *Mistretta* to require an express statement in the charge that the plaintiff is bringing claims on behalf of himself or herself and "others similarly situated." Defendants' argument is not persuasive. Although the charge at issue in *Mistretta* "in form included 'individually and on behalf of all others similarly situated,' " the Tenth Circuit did not focus on the form of the notice. Rather, as described above, the court believed the allegation that Sandia's "arbitrary action constitutes age discrimination against workers over 40" gave sufficient notice to the state agency so that it had an opportunity to investigate the charge, particularly in light of the ADEA's broad remedial scheme.

In short, this court believes *Mistretta* simply requires allegations of class-wide discrimination in order to satisfy the notice requirements of § 626(d). *See Gray v. Phillips Petroleum Co.*, 638 F. Supp. 789, 793-94 (D.Kan. 1986) (similar interpretation of *Mistretta*). *See also Anderson v. Montgomery Ward & Co.*, 852 F.2d 1008, 1017 (7th Cir. 1988) (holding explicit mention that a representative action is contemplated is not necessary).

Having concluded a filed charge need not contain an express statement that the charge is filed on behalf of others similarly situated, the court must now determine whether Mr. Thiessen's charge gives adequate notice of potential class claims. In his charge of discrimination, Mr. Thiessen sets forth the following allegations:

> Employment decisions at GE Capital for persons similarly situated to me show a "stark pattern" unexplainable on grounds other than age. . . . GE Capital has a well-established history of "early-outing" or attempting to "early-out" older white executives at or near my level. Further, the company has an express but covert policy of discriminating against older white employees. Older white employees who are performing at a level which meets or exceeds objective expectations are identified as "White blockers" or "blockers." They are called "Blockers" because their continued employment "blocks" the promotion of younger . . . "high potential" employees. The company's policy is to force the older white employees into early retirement or to eliminate the employee's position through restructuring.

In his charge, Mr. Thiessen also alleges that "GE Capital has a pattern and practice of removing employees identified as 'Blockers' from their positions."

There can be little doubt that such allegations contemplate class-wide discrimination on the basis of age and were sufficient to notify the EEOC and defendants of potential class

claims. Under these facts, bearing in mind the "broad remedial purposes" of the ADEA, the court believes the Tenth Circuit would find that Mr. Thiessen's charge satisfies the notice requirements of § 626(d).

B. The Timeliness Issue

Defendants also contend the single-filing rule is properly applied only to those individuals who could have filed timely EEOC charges at the time Mr. Thiessen actually filed his charge. For the reasons set forth below, the court agrees with defendants.

Although the Tenth Circuit upheld the application of the single-filing rule in *Mistretta,* it has not had the opportunity to address the question of whether the rule applies only to those individuals who could have filed timely EEOC charges at the time the charging plaintiff filed his or her charge. The Tenth Circuit, however, has strictly enforced administrative filing requirements in both the ADEA and Title VII contexts. *See, e.g., Hulsey v. Kmart, Inc.,* 43 F.3d 555, 557-58 (10th Cir. 1994); *Mascheroni v. Board of Regents,* 28 F.3d 1554, 1561 (10th Cir. 1994) ("The Supreme Court . . . has tempered an expansive treatment of the administrative statute of limitations with reminders of the necessary objectives of setting time bars.").

Moreover, the vast majority of circuit courts that have addressed this question apply the single-filing rule only to those plaintiffs whose claims arise in the "same time frame" as the filing plaintiff or who could have filed timely EEOC charges on the date which the filing plaintiff actually filed his or her EEOC charge. *See, e.g., Gitlitz v. Compagnie Nationale Air France,* 129 F.3d 554, 557 (11th Cir. 1997) ("It is clear that a plaintiff who has not filed an EEOC charge may 'piggyback' on the timely filing of an EEOC charge by another plaintiff who faced similar discriminatory treatment in the same time frame."); *EEOC v. Wilson Metal Casket Co.,* 24 F.3d 836, 840 (6th Cir. 1994) ("same time frame" requirement

used in Title VII context); *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 924-25 (9th Cir. 1982) (applicable period of limitations for class members should have been calculated by subtracting 300 days from the date of initial charge filed with EEOC) (Title VII context).

District courts appear to interpret the "same time frame" requirement in the manner defendants urge. *See, e.g., Vaszlavik v. Storage Tech. Corp.*, 175 F.R.D. 672, 680 (D.Colo. 1997) ("the administrative filing requirements are satisfied for all putative class members who could have filed an EEOC complaint at the time one of the representative plaintiffs filed such a complaint"); *Brooks v. Bellsouth Telecommunications, Inc.*, 164 F.R.D. 561, 570 (N.D.Ala. 1995) ("Claims that were time-barred on the date that plaintiff filed his suit cannot be revived by the commencement of a putative class action."); *Lange v. Cigna Individual Fin. Servs. Co.*, 766 F. Supp. 1001, 1003 (D.Kan. 1991) ("Notwithstanding the fact that the 'single-filing rule' allows non-complying plaintiffs to bypass the procedural requirements of Title VII, the court finds no reason to . . . wholly ignore the time requirements imposed by Title VII.")

While the court is not bound by these decisions, it has found no cases indicating that the rule should be otherwise. Moreover, Mr. Thiessen does not offer any persuasive arguments suggesting the rule should be modified in this case. Mr. Thiessen urges that equitable tolling or estoppel principles should apply to modify the limitations period for those opt-in plaintiffs who could not have filed a timely charge of discrimination at the time Mr. Thiessen filed his charge. In support of this argument, Mr. Thiessen focuses on defendants' conduct in "actively covering up the blocker program" and "misleading employees into believing false reasons for their adverse job actions." The court is not persuaded.

Generally, a cause of action accrues under the ADEA "on the date the employee is notified of an adverse employment

decision." *Hulsey v. Kmart, Inc.*, 43 F.3d 555, 557 (10th Cir. 1994) (quoting *Gray v. Phillips Petroleum Co.*, 858 F.2d 610, 613 (10th Cir. 1988) (citing *Delaware State College v. Ricks*, 449 U.S. 250, 256-59 (1980))). The Tenth Circuit has narrowly construed equitable exceptions to the time limitations set forth in federal anti-discrimination laws. *See, e.g., Biester v. Midwest Health Servs., Inc.*, 77 F.3d 1264, 1269 n.2 (10th Cir. 1996) ("extraordinary circumstances" are "necessary to justify equitable tolling under established Tenth Circuit precedent") (Title VII context); *Hulsey*, 43 F.3d at 557-58 (ADEA context).

In fact, equitable tolling principles apply "only if the circumstances of the case rise to the level of active deception . . . where a plaintiff has been lulled into inaction by her past employer, state or federal agencies, or the courts." *Merrill v. Cintas Corp.*, 941 F. Supp. 1040, 1045 (D.Kan. 1996) (quoting *Biester*, 77 F.3d at 1267-68); *Hulsey*, 43 F.3d at 557 (same). Such principles may also apply "if a plaintiff has been actively misled, or has in some extraordinary way been prevented from asserting his or her rights." *Merrill*, 941 F. Supp. at 1045 (quoting *Biester*, 77 F.3d at 1267-68).

Mr. Thiessen contends that equitable principles should apply in this case based on the conduct of the defendants. In such circumstances, the limitations period will not be tolled "unless an employee's failure to timely file resulted from either a 'deliberate design by the employer or actions that the employer should unmistakably have understood would cause the employee to delay filing his charge.' " *Hulsey*, 43 F.3d at 557 (quoting *Olson v. Mobil Oil Corp.*, 904 F.2d 198, 201 (4th Cir. 1990) (quoting *Price v. Litton Business Sys., Inc.*, 694 F.2d 963, 965 (4th Cir. 1982))).

The record does not suggest that the opt-in plaintiffs were actively deceived, lulled into inaction, or prevented from

asserting their rights in some extraordinary way.[10] The fact that the defendants concealed the blocker policy is not sufficient to warrant modification of the limitations period. *See Hulsey,* 43 F.3d at 558 ("A declaration of discrimination need not be issued before the statute of limitations begins to run under the ADEA."); *Olson v. Mobil Oil Corp.,* 904 F.2d 198, 203 (4th Cir. 1990) ("If equitable tolling applied every time an employer advanced a non-discriminatory reason for its employment decisions, it would be 'tantamount to asserting that an employer is equitably estopped whenever it does not disclose a violation of the statute.' If this were the case, the [300]-day period for filing a charge would have little meaning."), *quoted in Hulsey,* 43 F.3d at 558.

Thus, the court will permit to join this action only those similarly situated opt-in plaintiffs who could have filed timely EEOC charges on the date Mr. Thiessen filed his charge of discrimination. After reviewing interrogatory responses filed by each of the opt-in plaintiffs, the court finds eight opt-in plaintiffs are precluded from invoking the single-filing rule and joining the action. Seven opt-in plaintiffs resigned or were terminated from employment long before the start of the 300-day filing period. These individuals are Julia-Bates Allgood (resigned September 1993); Don B. Farrow (resigned

---

[10] During oral argument and in subsequent correspondence to the court, counsel for Mr. Thiessen requested the court defer any ruling on the "piggybacking" issue until either the dispositive motion stage or further briefing by Mr. Thiessen. This request was based on counsel's belief that the record was not yet complete with respect to the "piggybacking" issue and, in particular, the equitable tolling or estoppel arguments.

The court is not willing to delay resolution of this issue and cause all parties to incur additional expense. Mr. Thiessen has had several months of discovery to determine whether any additional arguments exist with respect to the equitable estoppel issue. Despite such discovery, counsel for Mr. Thiessen has failed to provide the court with any facts to suggest any potentially meritorious claims exist. Thus, the court deems the issue ripe for consideration on the record before it.

March 1993); Delilah N. Hicks (resigned April 1994); Billie M. Huddleston (resigned April 1992); Eugene Laurenzo (laid off September 1993); Larry Nobles (laid off September 1993); and Artemio Robles (resigned 1993). In addition, opt-in plaintiff Marjorie Manson has failed to allege any discriminatory treatment in the 300-day filing window. Rather, her claims date from 1992 through 1994. The court will not permit these eight individuals to join the action, and plaintiff's motion is denied to that extent.

C. The Scope of Mr. Thiessen's Charge

Finally, defendants maintain the single-filing rule is inapplicable because the claims of the opt-in plaintiffs are beyond the scope of Mr. Thiessen's charge. The court disagrees.

The Tenth Circuit recognizes the rule that a complaint may include any claims of discrimination not listed in the EEOC charge, as long as such claims are "like or reasonably related to the allegations of the EEOC charge." *Seymore v. Shawver & Sons, Inc.*, 111 F.3d 794, 799 (10th Cir. 1997) (quoting *Brown v. Hartshorne Pub. Sch. Dist. No. 1*, 864 F.2d 680, 682 (10th Cir. 1988) (quoting *Oubichon v. North Am. Rockwell Corp.*, 482 F.2d 569, 571 (9th Cir. 1973))). This rule is consistent with the purposes of the filing requirement—to provide notice of the alleged violation to the charged party, and to provide the EEOC with the opportunity to conciliate the claim. *Id.* (citing *Schnellbaecher v. Baskin Clothing Co.*, 887 F.2d 124, 126 (7th Cir. 1989)). The Tenth Circuit has not analyzed the meaning of the "like or reasonably related" rule in the context of a class or collective action, however.

Thus, the court must determine whether the claims of the opt-in plaintiffs are "like or reasonably related to" the allegations in Mr. Thiessen's charge of discrimination. In his charge, Mr. Thiessen alleges defendants "repeatedly filled positions, for which I have applied and for which I have been qualified, with individuals who are younger . . . than I."

Mr. Thiessen submitted a five-page affidavit detailing these allegations. If these allegations constituted the entirety of Mr. Thiessen's charge, the court would be inclined to limit the claims of the opt-in plaintiffs to failure-to-promote claims.

Significantly, however, Mr. Thiessen also alleges that "employment decisions" for "persons similarly situated" to Mr. Thiessen show a "stark pattern unexplainable on grounds other than age" and that "the company has an express but covert policy of discriminating against older white employees." Mr. Thiessen goes on to explain, albeit briefly, the blocker policy and how "GE Capital has a pattern and practice of removing employees identified as 'Blockers' from their positions."

The court is satisfied that the claims of the opt-in plaintiffs are "reasonably related" to Mr. Thiessen's allegations of a company-wide policy of age discrimination. Although the claims of the opt-in plaintiffs are admittedly diverse with respect to the adverse employment actions alleged, the claims purportedly arise from the alleged blocker policy as set forth in Mr. Thiessen's charge. In essence, the allegations are sufficiently broad to alert the EEOC and defendants that more is alleged than an isolated act of discrimination. Thus, the filed charge fulfilled the purposes of the filing requirement—it gave defendants notice of charges related to the alleged blocker policy and provided the EEOC with the opportunity to conciliate. *See Seymore,* 111 F.3d at 799 (citing *Schnellbaecher,* 887 F.2d at 126); *Martin v. Nannie & the Newborns, Inc.,* 3 F.3d 1410, 1416 n.7 (10th Cir. 1993) ("[C]onsideration of complaints not expressly included in an EEOC charge is appropriate where the conduct alleged would fall within the scope of an EEOC investigation which would reasonably grow out of the charges actually made."). In short, the court believes the Tenth Circuit would find the claims of the opt-in plaintiffs "like or reasonably related" to the claims

of Mr. Thiessen for purposes of invoking the single-filing rule."[11]

IV. The "Similarly Situated" Requirement

The ADEA permits a plaintiff to proceed on behalf of himself or herself "and other employees similarly situated." 29 U.S.C. § 216(b); 29 U.S.C. § 626(b) (incorporating remedial and procedural provisions of the FLSA). Mr. Thiessen contends the opt-in plaintiffs are similarly situated for purposes of § 216(b) in that each opt-in plaintiff has been adversely affected by a company-wide policy of age discrimination (*i.e.*, the "blocker" program). Defendants highlight the dramatic differences among the opt-in plaintiffs and maintain the blocker policy is insufficient to render the opt-in plaintiffs "similarly situated."

After carefully weighing the arguments advanced by both parties and the record evidence before it, and not without grave misgivings, the court finds Mr. Thiessen has made a sufficient threshold showing that the opt-in plaintiffs are "similarly situated" to justify a provisional certification as a collective action under § 216(b), subject to the opportunity for defendants to seek decertification by a timely filed motion after the close of all discovery on liability.

A. Applicable Standards

Neither the FLSA nor the ADEA defines "similarly situated," and the Tenth Circuit has not had an opportunity to discuss the meaning of the phrase. Indeed, very few circuit courts have addressed the appropriate standard for determining whether plaintiffs are similarly situated under § 216(b).

---

[11] This is particularly true in light of the Tenth Circuit's recognition of the "broad remedial purposes" of the ADEA. *Mistretta v. Sandia Corp.*, 639 F.2d 588, 593-94 n.3 (10th Cir. 1980) (quoting *Bean v. Crocker Nat'l Bank*, 600 F.2d 754, 759 (9th Cir. 1979)).

Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1213 (5th Cir. 1995).

Several district courts, however, have had occasion to address the "similarly situated" issue and have explicitly adopted a two-tiered approach to certification determinations under § 216(b). *See, e.g., Vaszlavik v. Storage Tech. Corp.*, 175 F.R.D. 672, 678-79 (D.Colo. 1997); *Bayles v. American Med. Response of Colorado, Inc.*, 950 F. Supp. 1053, 1066-67 (D.Colo. 1996); *Brooks v. Bellsouth Telecommunications, Inc.*, 164 F.R.D. 561, 568 (N.D.Ala. 1995). Other district courts have implicitly recognized this two-step approach. *See, e.g., Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 361 (D.N.J. 1987) ("[I]n other cases the similarly situated inquiry is posed prior to class certification, and based upon the court's determination, the class or notice of the class action is tailored accordingly. This case presents a situation of a class which was conditionally certified without a determination of whether its members are similarly situated."); *Burt v. Manville Sales Corp.*, 116 F.R.D. 276, 277 (D.Colo. 1987) ("It remains for opt-in plaintiffs to show they are in fact similarly situated . . .; however, at this stage, the facts pled are not purely personal to the plaintiffs before the Court."); *Allen v. Marshall Field & Co.*, 93 F.R.D. 438, 445 (N.D.Ill. 1982) ("We decide only that notice of this action to all potential claimants is appropriate, regardless of whether we may later find it necessary to bar some of them from joining in this action.").

Under this two-tiered analysis,

> [t]he first determination is made at the so-called "notice stage." At the notice stage, the district court makes a decision—usually based only on the pleadings and any affidavits which have been submitted—whether notice of the action should be given to potential class members.
>
> Because the court has minimal evidence, this determination is made using a fairly lenient standard, and typically results in "conditional certification" of a representative class.

Brooks, 164 F.R.D. at 568 (quoting *Mooney*, 54 F.3d at 1213-14). According to some courts, certification at the notice stage requires "nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan." *See, e.g., Vaszlavik*, 175 F.R.D. at 678 (quoting *Sperling v. Hoffman-La Roche, Inc.*, 118 F.R.D. 392, 407 (D.N.J. 1988)); *Church v. Consolidated Freightways, Inc.*, 137 F.R.D. 294, 303 (N.D.Cal. 1991) (same).[12]

Under this approach, the district court then makes a second determination after discovery is largely complete and the case is ready for trial. At this stage, "the court has much more information on which to base its decision, and makes a factual determination on the 'similarly situated' question." *Brooks*, 164 F.R.D. at 568 (quoting *Mooney*, 54 F.3d at 1214). Thus, courts generally analyze the "similarly situated" issue under a higher standard at this stage. *See Vaszlavik*, 175 F.R.D. at 678 ("At this second stage, although not specifically deemed, the "similarly situated" standard is higher.") If the plaintiffs are similarly situated, the district court allows the case to proceed to trial as a collective action under § 216(b).[13]

---

[12] In light of this "lenient" standard, a vast majority of district courts grant conditional certification in § 216(b) actions at the notice stage. *See, e.g., Vaszlavik*, 175 F.R.D. at 678; *Consolidated Freightways, Inc.*, 137 F.R.D. at 303-04; *Heagney v. European Am. Bank*, 122 F.R.D. 125, 129-30 (E.D.N.Y. 1988); *Sperling*, 118 F.R.D. at 406-07; *Manville Sales Corp.*, 116 F.R.D. at 277; *Walker v. Mountain States Tel. & Tel. Co.*, 112 F.R.D. 44, 47 (D.Colo. 1986); *Owens v. Bethlehem Mines Corp.*, 108 F.R.D. 207, 213 (S.D.W.Va. 1985); *Marshall Field & Co.*, 93 F.R.D. at 445.

[13] In light of this higher standard, the vast majority of district courts deny certification at the second stage of analysis. *See, e.g., Bayles*, 950 F. Supp. at 1066-67 (FLSA context); *Brooks*, 164 F.R.D. at 568-69 (determination made at notice stage but only after court had allowed "extensive" discovery on issue); *Ulvin v. Northwestern Nat'l Life Ins. Co.*, 141 F.R.D. 130, 131 (D.Minn. 1991); *Lusardi*, 118 F.R.D. at 359-61. *See also EEOC v. MCI Int'l, Inc.*, 829 F. Supp. 1438, 1445-46 (D.N.J. 1993) (denying

This case, however, is different. Clearly, Mr. Thiessen is beyond the "notice stage" in that thirty individuals have already filed opt- in consent forms and are ready to be joined in this action. Moreover, at the time of Mr. Thiessen's motion, the parties had engaged in three months of discovery with respect to the opt-in group. The court is not convinced, however, that the record is sufficiently complete to permit an analysis under the "higher" standard typically used at the post-discovery stage and believes that it would be better informed upon the completion of all discovery pertinent to liability.[14]

Thus, the court adopts an "intermediate" approach in analyzing the "similarly situated" issue. To the extent the record has been developed, the court incorporates an analysis of the relevant factors found in post-discovery cases.[15] The court actually makes its determination to provisionally certify, however, under a more lenient standard in light of deficiencies in the record.

B. The "Similarly Situated" Analysis

Most district courts analyzing the "similarly situated" requirement at the post-discovery stage focus on three factors in determining whether plaintiffs are similarly situated: (1) the disparate factual and employment settings of the individual

---

certification in summary judgment context). *But see Frank v. Capital Cities Communications, Inc.*, No. 80-CIV-2188-CSH, 1983 WL 643, at *3 (S.D.N.Y. 1983) (denying defendants' motion to dismiss opt-in plaintiffs and certifying action at second stage).

[14] Ironically, both parties insisted during oral argument that the record was sufficiently developed to permit a conclusive determination of the "similarly situated" issue. The court remains unpersuaded.

[15] In addition, incorporating an analysis of the relevant factors in post-discovery cases is beneficial to the parties in that the court will analyze any motion to decertify in light of these factors.

plaintiffs; (2) the various defenses available to defendant which appear to be individual to each plaintiff; and (3) fairness and procedural considerations. *See, e.g., Bayles,* 950 F. Supp. at 1066; *Brooks,* 164 F.R.D. at 568; *Lusardi,* 118 F.R.D. at 359. The court will address each of these factors in turn.[16]

1. Disparate Factual and Employment Settings

Defendants contend the vastly different employment situations and claims of the opt-in plaintiffs preclude this action from proceeding as a collective action. According to Mr. Thiessen, however, the alleged company-wide policy of age discrimination (*i.e.,* the "blocker" policy) renders the opt-in plaintiffs similarly situated despite such differences in employment situations and claims.

Several courts have denied certification of a § 216(b) action when the opt- in plaintiffs represent dissimilar employment backgrounds. In *Lusardi,* for example, the court decertified a collective action under § 216(b) in part because of a "dramatic lack of similarity in age, salary, organization employment, and geographic location by state and city." 118 F.R.D. at 358. On remand, the court again decided to decertify the action, noting that the opt-in plaintiffs performed different jobs at different geographic locations and were subject to different job actions concerning reductions in work force which occurred at various times as a result of various decisions by different supervisors

---

[16] In addition to these three factors, defendants argue that various conflicts among members of the opt-in group render certification improper. For example, Mr. Thiessen supervised opt-in plaintiff Robert DeMartine during periods in which Mr. DeMartine claims he experienced discrimination in the awarding of bonuses and raises. During oral argument, however, counsel for Mr. Thiessen explained that, according to plaintiff's evidence, the true decisionmakers with respect to hiring, firing, compensation and other personnel matters are individuals in the Human Resources department. Thus, based on the record before it, the court is not persuaded any true "conflicts" exist among the opt-in group.

made on a decentralized employee-by-employee basis. *Lusardi v. Xerox Corp.*, 122 F.R.D. 463, 465 (D.N.J. 1988).[17]

Similarly, in *Brooks v. Bellsouth Telecommunications, Inc.*, the court refused to certify a collective action under § 216(b) after extensive discovery in part because the proposed plaintiff group covered all nine states in which the defendant operated. 164 F.R.D. at 569. According to the court,

> These employees would therefore be located within separate departments and under separate supervisors. Additionally, the [employees] represent a wide span in ages ranging from forty to seventy-five. Also, the involuntarily dismissed employees represent a variety of "pay grades." Even at this stage, it is clear that any claims of the proposed opt-in plaintiffs would present disparate factual and employment settings.

Id.; *Ulvin v. Northwestern Nat'l Life Ins. Co.*, 141 F.R.D. 130, 131 (D.Minn. 1991) (denying certification of thirty opt-in plaintiffs after discovery where "the class members var[ied] significantly as to age, year of termination, division in the company in which they worked, offices in the company in which they worked, employment status, supervisors and salaries."). *Cf. Hyman v. First Union Corp.*, 982 F. Supp. 1, 4, 8 (D.D.C. 1997) (granting certification after discovery in part because of significant similarities in employment situations among the opt-in group including geographic location, adverse employment action and relatively short time frame).

Significantly, the plaintiff in *Brooks* alleged an "overarching" policy of the defendant of eliminating older employees. 164 F.R.D. at 564. Specifically, the plaintiff argued the company had "formulated and implemented a

---

[17] The court in *Lusardi* noted, however, that "plaintiffs, after extensive discovery, ha[d] not uncovered any policy or practice of age discrimination at Xerox." *Lusardi*, 118 F.R.D. at 359.

five-year operations plan" which contained a policy of offering illegal early retirement incentives. *Id.* Like Mr. Thiessen, the plaintiff submitted a series of documents which he alleged evidenced an overall policy of age discrimination. *Id.*[18] Despite such evidence, the court rejected the plaintiff's theory and denied certification. *Id.* at 566 ("[P]laintiff has not put forth substantial evidence that the proposed class members were the victims of a single decision, policy, or plan infected by discrimination.").

Consistent with these principles, defendants highlight the significant differences among the thirty opt-in plaintiffs, both in terms of employment situation and alleged discriminatory treatment. The opt-in plaintiff group consists of individuals who have held dozens of different positions across seven states. They range in age from approximately 45 to 60 years old and range in tenure from 4 years to 31 years. Moreover, the opt-in plaintiffs have been supervised by different individuals. In addition, the opt-in plaintiffs represent various salary grades.

More significantly, the opt-in plaintiffs allege widely varying adverse employment actions spanning nearly ten years. The challenged employment actions range from failure to promote, failure to transfer, layoff and constructive discharge to downgraded performance evaluations and discrimination in job assignments and training. According to defendants, the thirty opt-in plaintiffs dispute well over two hundred separate employment actions.[19]

---

[18] One document was an outline of discussion topics for a meeting attended by representatives of the defendant. The outline contained topics such as "Workforce—Mature—Move Out" and "Weaknesses—Aging Work Force." *Brooks*, 164 F.R.D. at 564.

[19] A brief review of the interrogatory responses filed by each opt-in plaintiff with respect to the alleged discriminatory conduct reveals the vastly different nature and degree of the claims.

In response, Mr. Thiessen directs the court to *Frank v. Capital Cities Communications, Inc.*, No. 80-CIV-2188-CSH, 1983 WL 643 (S.D.N.Y. Oct. 11, 1983). In *Frank*, the defendants argued that the opt-in plaintiffs were not similarly situated because they held a wide variety of jobs and their specific complaints were not identical. *Id.* at *2. Like Mr. Thiessen, plaintiffs' theory was that each opt-in plaintiff had been the victim "of a plan by [defendants] to rid itself of its older employees through harassment and termination." *Id.* Although the court acknowledged the claims of the opt-in plaintiffs were different, it reasoned that such claims "could all quite logically be manifestations of defendants' campaign." *Id.* at *3. Ultimately, the court certified the thirteen opt-in plaintiffs:

> To deny them class treatment would be tantamount to declaring that any employer can escape ADEA class liability so long as it discriminates against a diverse group of aged employees over a wide geographic range in a number of ways, such as termination, salary, promotion, and working conditions.

Id. at *2.

This court finds the reasoning of the *Frank* decision to be persuasive at this juncture under the particular circumstances of this case. Mr. Thiessen has not simply averred the existence of a discriminatory policy or merely argued that circumstantially one should infer its existence by virtue of numerous people in the protected category having incurred adverse employment actions. Instead, he has come forward with direct evidence of an overall policy of purported age discrimination. Moreover, the names of some of the opt-in plaintiffs appear on "blocker" lists. The court believes this evidence cannot be so easily discounted just because the alleged discrimination was meted out "over a wide geographic range in a number of ways" and that it merits a threshold determination that the opt-in plaintiffs are "similarly situated"

to Mr. Thiessen for purposes of something akin to conditional certification. However, the court remains troubled by a puzzling lack of any significant showing by Mr. Thiessen that there is a link between this alleged policy and the adverse job actions. Even if there was a discriminatory policy, the opt- in plaintiffs are only "similarly situated" if they can make a submissible case that they, too, were victims of it. It is because of that deficiency, at least in part, that the court is unwilling to grant final certification on the record before it.

In order to survive a motion to decertify, therefore, Mr. Thiessen will need to set forth what he deems to be the specific link between the blocker policy and what occurred with each opt-in plaintiff. Absent such evidence, the argument that the opt-in plaintiffs should be considered "similarly situated" for purposes of trial will be significantly undercut and the likelihood of decertification will be dramatically increased.[20]

2. Various Defenses Available to Defendants

Defendants also argue that certification under § 216(b) is improper in that they will assert numerous individualized defenses with respect to the varied claims of the opt-in plaintiffs. Again, Mr. Thiessen maintains the "blocker" policy renders the opt-in plaintiffs similarly situated despite the availability of any specific individualized defenses.

Several courts have denied certification after discovery in part due to the potential defenses available to the defendant. *See, e.g., Bayles,* 950 F. Supp. at 1067 (decertifying class in FLSA context where the case was "fraught with questions

---

[20] As discussed during oral argument, the court recognizes the possibility that the evidence would support a finding that a group which is less than the entire list of opt-ins would actually be "similarly situated" for purposes of proceeding to trial as a collective action. In responding to any motion to decertify, Mr. Thiessen might consider presenting evidence which would allow the court to consider such an alternative.

requiring distinct proof as to individual plaintiffs" and defenses could not be addressed on a class-wide basis); *Brooks*, 164 F.R.D. at 569 (denying certification in part because the "circumstances of employment termination are diverse" and the court "would be faced with numerous individualized defenses," including waiver issues).

In *Lusardi*, the court considered not only the vastly different employment settings of the opt-in plaintiffs, but also the various defenses available to Xerox. 118 F.R.D. at 362-70. After a detailed discussion of possible defenses including business necessity and good cause, the court ultimately concluded that "[c]onsolidation of these claims into a representative class with the attendant defenses would not provide for an efficient proceeding." *Id.* at 370.

In response to this point, Mr. Thiessen directs the court to *Hyman v. First Union Corp.*, No. CIV.A.94-1043-RCL, 982 F. Supp. 1, 1997 WL 665480 (D.D.C. Aug. 12, 1997). In *Hyman*, the opt-in plaintiffs were terminated in 1992 and 1993 after First Union acquired the institutions at which plaintiffs were employed. *Id.* at 1-2. The opt-in plaintiffs alleged the termination decisions were based solely on age. *Id.* First Union characterized the terminations as a "benevolent incursion that rescued a failed institution." *Id.*

In response to the plaintiffs' motion to certify the action under § 216(b), First Union argued that the opt-in plaintiffs were not similarly situated because of the different defenses available, including good cause, business necessity and waiver. *Id.* at 5-6. Rejecting First Union's argument, the court concluded that "the main defense of defendants will focus on the business necessity of immediately revamping [the company] so that it could become a successful banking institution." *Id.* at 6. Ultimately, the court allowed the case to proceed as a collective action. *Id.*

In contrast, defendants here argue that they will assert defenses specific to the numerous individualized claims of

each opt-in plaintiff. The court recognizes this possibility, particularly in light of the number and types of adverse employment actions at issue. The record, however, fails to provide the requisite detail to support defendants' bare assertions. Other than the potential "waiver" defense, defendants have not set forth any other defenses or explanations for any of the adverse employment actions at issue. Without such support, the court cannot adequately assess whether individualized defenses will predominate at trial.[21]

Thus, in a motion to decertify, defendants will have the opportunity to further develop the record with respect to these individualized defenses and the particularized reasons for the adverse actions at issue. At that point, the court will be better able to ascertain whether proceeding as a collective action is appropriate. If defendants can truly convince the court that individual issues would predominate at trial, the contention that the opt-in plaintiffs are similarly situated would likely be largely eviscerated.

3. Fairness and Procedural Considerations

Finally, the court considers the fairness and procedural aspects of allowing this case to proceed as a collective action under § 216(b). Specifically, the court is concerned with coherently managing a trial of the action and presenting the evidence in a manner that will not confuse the jury or unduly prejudice any party. If the defendants actually do possess substantial evidence of bona fide individualized defenses, the result may be such a mish-mash of highly detailed evidence that in a collective action both the defendants and the opt-in plaintiffs would run the risk of having any individualized

---

[21] During oral argument, defendants indicated that detailed explanations for each adverse employment action were set forth in defendants' interrogatory responses. These explanations, however, were not made part of the record.

consideration of the claims lost in the mire. There is simply a realistic limit on what a jury may reasonably be expected to absorb, retain and process—and this case may be in danger of passing beyond that limit. How this potential problem can be solved, if it can be solved, requires further exposition.[22]

V. Conclusions

For all the reasons set forth above, then, the court grants the plaintiff's motion in part and provisionally permits the following opt-in plaintiffs to join for the purposes of maintaining a collective action: Gene Autry; Pamela S. Chudyba; Gwen Colwell; Barbara A. Croy; Jan. L. Cullison; Robert DeMartine; James C. Flower; Lawrence P. Fries; Terry M. Grisham; Elaine Hayden; Melva Heid; Linda L. Hess; Christopher P. Kaesberg; James Lawson; Brenda Lewis; Robert Marsonette; Ray Osburn; Kimberly Perron; Diana Polsinelli; Patricia Serra; Salli J. Shirey; and Janice F. Trice. However, this subject may be revisited in a timely filed motion to decertify, at which point the court anticipates that all parties will address the court's particular concerns expressed herein,

---

[22] Mr. Thiessen suggests bifurcating the trial of this action into a liability phase and remedy phase. Under this approach, the initial phase would focus solely on whether the alleged blocker policy existed and whether the policy was implemented. Moreover, defendants would not be permitted to raise individual defenses until the remedial phase. The court believes that this approach would be unduly prejudicial to the defendants. The issues relevant to a determination of liability are not only whether the policy existed and was implemented, but also whether the policy is the reason for each adverse employment action. Thus, the defendants explanations with respect to each adverse employment action are critical to the liability issue. In any event, the court believes such an approach in the context of a jury trial would be subject to serious constitutional challenges. *See, e.g., Lusardi*, 118 F.R.D. at 371-72 ("[B]ecause congress has included certain defenses within the statutory scheme of the ADEA, it is contrary to due process to prevent their utilization by a defendant in the liability phase of a trial.").

both by citation to the evidentiary record and by argument in their briefs.

IT IS THEREFORE ORDERED BY THE COURT THAT plaintiff's motion to join additional parties as plaintiffs and to certify the action as a collective action is granted in part and denied in part, subject to further review of the certification issue in connection with a motion to decertify.

IT IS SO ORDERED.

MEMORANDUM AND ORDER ON MOTION

Plaintiff Gary A. Thiessen moved the court to join thirty opt-in plaintiffs and to certify the action as a collective action under the Age Discrimination in Employment Act (ADEA) pursuant to 29 U.S.C. § 216(b). On February 5, 1998, the court issued a Memorandum and Order granting plaintiff's motion in part. Specifically, the court provisionally permitted twenty-two opt-in plaintiffs to join for the purposes of maintaining a collective action.

The court concluded, however, that eight opt-in plaintiffs were precluded from invoking the single-filing rule and joining the action. Thus, the court denied plaintiff's motion to that extent. The eight opt-in plaintiffs precluded from joining the action now move the court for an extension of time to request reconsideration of the court's order (Doc. # 294). For the reasons set forth below, the motion of the opt-in plaintiffs is denied.

Discussion

The Federal Rules of Civil Procedure do not provide a mechanism pursuant to which a party may file a "motion to reconsider." *United States v. Dryden,* No. 93-20048-04, 96-3421-JWL, 1997 WL 458285, *1 (D.Kan. July 25, 1997) (citing *United States v. Emmons,* 107 F.3d 762, 764 (10th Cir. 1997)); *Hatfield v. Board of County Comm'rs,* 52 F.3d 858, 861 (10th Cir. 1995). Moreover, the opt-in plaintiffs have not specified the procedural basis for their contemplated motion to reconsider. Thus, the court will construe plaintiffs' motion as a motion for an extension of time to file a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e) or, in the alternative, a motion seeking relief from a judgment under

Fed. R. Civ. P. 60(b).[1] *See Hatfield*, 52 F.3d at 861 (court construes a motion to reconsider as a motion under either Fed.R.Civ.P. 59(e) or Fed.R.Civ.P. 60(b)); *Dryden*, 1997 WL 458285, at *1 (citing *Emmons*, 107 F.3d at 764) (same).

According to Rule 59(e), any motion to alter or amend a judgment must be filed within 10 days after entry of the judgment. Fed. R. Civ. P. 59(e). The court has no authority to extend this 10-day period. *See* Fed. R. Civ. P. 6(b). Thus, plaintiffs' notion for an extension of time to request reconsideration is denied to the extent the prospective motion to reconsider is contemplated under Rule 59(e).

A motion for relief from judgment or order pursuant to Rule 60(b), however, may be filed "within a reasonable time" but, under certain circumstances, not more than one year after the judgment or order was entered. Fed. R. Civ. P. 60(b). Thus, the opt-in plaintiffs need not move the court for an extension of time within which to file a motion under Rule 60(b). Accordingly, plaintiffs' motion for an extension of time is denied as moot to the extent plaintiffs' prospective motion to reconsider is contemplated under Rule 60(b).[2]

---

[1] Although Rule 7.3 of the local rules for the District of Kansas provides a procedural basis for filing a motion to reconsider, this rule is intended to apply only to nondispositive judgments and orders. *Dryden*, 1997 WL 458285, at *1 n.1 (citing *Steele v. Ellis*, 961 F. Supp. 1458, 1467 (D.Kan. 1997)). The opt-in plaintiffs seek an extension to file a motion for reconsideration of a dispositive order. Thus, plaintiffs' notion for extension is denied to the extent the prospective motion to reconsider is contemplated under Rule 7.3.

[2] The court notes, however, that a "Rule 60(b) motion is not a vehicle to re-argue the merits of the underlying judgment, to advance new arguments which could have been presented in the parties' original motion papers, or as a substitute for appeal." *Sapp v. Greif*, 173 F.R.D. 531, 532 (D.Kan. 1997) (citing *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 576-77 (10th Cir. 1996)). Relief under Rule 60(b) is extraordinary and may be granted only in exceptional circumstances. *Sapp*, 173 F.R.D. at 532 (citing *Cashner*, 98 F.3d at 576-77).

IT IS THEREFORE ORDERED BY THE COURT THAT the opt-in plaintiffs' motion for extension of time to request reconsideration (Doc. # 294) is denied.

IT IS SO ORDERED.

CONSTITUTION OF THE UNITED STATES

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VII.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

UNITED STATES CODE
TITLE 29. LABOR
CHAPTER 14—AGE DISCRIMINATION IN EMPLOYMENT

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§ 622. Education and research program; recommendation to Congress

(a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this chapter, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures—

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication, and other interested persons the findings of studies and other materials for the promotion of employment;

(3) foster through the public employment service system and through cooperative effort the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons;

(4) sponsor and assist State and community informational and educational programs.

(b) Not later than six months after the effective date of this chapter, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 631 of this title.

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a

bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section—

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan—

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting

under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Repealed. Pub.L. 101-239, Title VI, § 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233

(h) Practices of foreign corporations controlled by American employers; foreign employers not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the—

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control,

of the employer and the corporation.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits—

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan—

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title and

section 401(a)(14)(C) of Title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of Title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of Title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of Title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals or it is a plan permitted by subsection (m) of this section.

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of Title 26 and subparagraphs (C) and (D) of section 411(b)(2) of Title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2).

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of Title 26.

(9) For purposes of this subsection—

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of Title 26.

(j) Employment as firefighter or law enforcement officer

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained—

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B)(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of—

(I) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

(k) Seniority system or employee benefit plan; compliance

A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.

(l) Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section—

(1) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because—

(A) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(B) a defined benefit plan (as defined in section 1002(35) of this title) provides for—

(i) payments that constitute the subsidized portion of an early retirement benefit; or

(ii) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(2)(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age—

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii);

are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501(c)(17) of Title 26) that—

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age)—

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.);

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act; or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E)(i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $3,000 per year for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on October 16, 1990, and shall be adjusted on an annual basis, with respect to a contingent event that occurs subsequent to the first year after October 16, 1990, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions)—

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

(m) Voluntary retirement incentive plans

Notwithstanding subsection (f)(2)(b), it shall not be a violation of subsection (a), (b), (c), or (e) solely because a plan of an institution of higher education (as defined in section 1001 of Title 20) offers employees who are serving under a

contract of unlimited tenure (or similar arrangement providing for unlimited tenure) supplemental benefits upon voluntary retirement that are reduced or eliminated on the basis of age, if—

(1) such institution does not implement with respect to such employees any age-based reduction or cessation of benefits that are not such supplemental benefits, except as permitted by other provisions of this chapter;

(2) such supplemental benefits are in addition to any retirement or severance benefits which have been offered generally to employees serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure), independent of any early retirement or exit-incentive plan, within the preceding 365 days; and

(3) any employee who attains the minimum age and satisfies all non-age-based conditions for receiving a benefit under the plan has an opportunity lasting not less than 180 days to elect to retire and to receive the maximum benefit that could then be elected by a younger but otherwise similarly situated employee, and the plan does not require retirement to occur sooner than 180 days after such election.

§ 624. Study by Secretary of Labor; reports to President and Congress; scope of study; implementation of study; transmittal date of reports

(a)(1) The Secretary of Labor is directed to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress. Such study shall include—

(A) an examination of the effect of the amendment made by section 3(a) of the Age Discrimination in Employment Act Amendments of 1978 in raising the upper age limitation established by section 631(a) of this title to 70 years of age;

(B) a determination of the feasibility of eliminating such limitation;

(C) a determination of the feasibility of raising such limitation above 70 years of age; and

(D) an examination of the effect of the exemption contained in section 631(c) of this title, relating to certain executive employees, and the exemption contained in section 631(d) of this title, relating to tenured teaching personnel.

(2) The Secretary may undertake the study required by paragraph (1) of this subsection directly or by contract or other arrangement.

(b) The report required by subsection (a) of this section shall be transmitted to the President and to the Congress as an interim report not later than January 1, 1981, and in final form not later than January 1, 1982.

§ 625. Administration

The Secretary shall have the power—

(a) Delegation of functions; appointment of personnel; technical assistance

to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee for service basis, as he deems necessary to assist him in the performance of his functions under this chapter;

(b) Cooperation with other agencies, employers, labor organizations, and employment agencies

to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this chapter.

§ 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this

chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective

defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice

Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum—

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

§ 627. Notices to be posted

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission setting forth information as the Commission deems appropriate to effectuate the purposes of this chapter.

§ 628. Rules and regulations; exemptions

In accordance with the provisions of subchapter II of chapter 5 of Title 5, the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.

§ 629. Criminal penalties

Whoever shall forcibly resist, oppose, impede, intimidate or interfere with a duly authorized representative of the Equal Employment Opportunity Commission while it is engaged in the performance of duties under this chapter shall be punished by a fine of not more than $500 or by imprisonment for not more than one year, or by both: Provided, however, That no person shall be imprisoned under this section except when there has been a prior conviction hereunder.

§ 630. Definitions

For the purposes of this chapter—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and

any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C.A. § 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C.A. § 151 et seq.]; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning

of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management

Reporting and Disclosure Act of 1959 [29 U.S.C.A. § 401 et seq.].

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.].

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this subsection, "detention" includes the duties of employees assigned to guard individuals incarcerated in any penal institution.

(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

§ 631. Age limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

(b) Employees or applicants for employment in Federal Government

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives or high policymakers

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

§ 632. Annual report to Congress

The Equal Employment Opportunity Commission shall submit annually in January a report to the Congress covering its activities for the preceding year and including such information, data and recommendations for further legislation in connection with the matters covered by this chapter as it may find advisable. Such report shall contain an evaluation

and appraisal by the Commission of the effect of the minimum and maximum ages established by this chapter, together with its recommendations to the Congress. In making such evaluation and appraisal, the Commission shall take into consideration any changes which may have occurred in the general age level of the population, the effect of the chapter upon workers not covered by its provisions, and such other factors as it may deem pertinent.

§ 633. Federal-State relationship

(a) Federal action superseding State action

Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

(b) Limitation of Federal action upon commencement of State proceedings

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

§ 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in the Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions: bona fide occupational qualification

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out

its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provisions to personnel action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

(g) Study and report to President and Congress by Equal Employment Opportunity Commission; scope

(1) The Equal Employment Opportunity Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 631(b) of this title.

(2) The Equal Employment Opportunity Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

§ 634. Authorization of appropriations

There are hereby authorized to be appropriated such sums as may be necessary to carry out this chapter.

UNITED STATES CODE
TITLE 29. LABOR
CHAPTER 8—FAIR LABOR STANDARDS

§ 216. Penalties

* * *

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint

by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

GARY A. THIESSEN
10516 Bluejacket Street
Overland Park, KS 66214

Plaintiff,

v.

GENERAL ELECTRIC CAPITAL CORPORATION
d/b/a GE Capital,
and its representatives
9510 West 67th Street
Merriam, KS 66203
(SERVE: The Corporation Company, Inc.
515 South Kansas Avenue
Topeka, KS 66603)
and
MONTGOMERY WARD CREDIT SERVICES, INC.
formerly known as
Monogram Retailer Credit Services, Inc.
a subsidiary of General Electric
Capital Corporation,
and its representatives
9510 West 67th Street
Merriam, KS 66203
(SERVE: The Corporation Company, Inc.
515 South Kansas Avenue
Topeka, KS 66603)

Defendants.

Case No. 96-2410-KHV

JURY TRIAL DEMANDED

Pursuant to Rule 15(a), there having been no responsive pleading served, plaintiff hereby files his First Amended Complaint.

FIRST AMENDED COMPLAINT

COMES NOW plaintiff on his own behalf and on behalf of all others similarly situated, and for his causes of action against defendants, states, alleges and avers as follows:

Parties, General Allegations, Jurisdiction & Venue

1. Plaintiff Gary A. Thiessen is an individual residing at 10516 Bluejacket Street, Overland Park, KS.

2. Plaintiff belongs to a class of individuals over the age of forty (40), employed by defendants.

3. Defendant General Electric Capital Corporation (hereinafter "defendant GECC") is a foreign corporation organized under the laws of the state of New York, and is authorized to do business in the state of Kansas, where it maintains an office for the conduct of its ordinary and customary business in Merriam, Kansas, at 9510 West 67th Street. Defendant GECC is therefore doing business in the state of Kansas in this judicial district.

4. Defendant Montgomery Ward Credit Services, Inc. (hereinafter "defendant MWCS"), a wholly owned subsidiary of GECC, is a foreign corporation organized under the laws of the state of Delaware, and is authorized to do business in the state of Kansas, at 9510 West 67th Street. Defendant MWCS is therefore doing business in the state of Kansas in this judicial district.

5. Top level management employees of defendant MWCS are also top level management employees of defendant GECC, and vice versa. The president of defendant MWCS reports to representative of GECC.

6. Defendants, at all times relevant hereto, are and have been "employers" within the meaning of the Age Discrimination in Employment Act, 29 U.S.C. Section 630 (b) (ADEA), and 42 U.S.C. Section 2000 (e) et seq.

7. Defendants employ (and at times relevant hereto employed) more than 500 employees.

8. Both jurisdiction and venue are proper in this Court, because federal questions are involved, and because the unlawful employment practices and all other transactions were committed within this judicial district Venue is therefore proper in this Court pursuant to the provisions of 42 U.S.C. Section 2000 (e), et seq., 28 U.S.C. Sections 1331 (federal question) and Section 1.391 (b) (c) (venue).

9. This Court has jurisdiction of this cause of action, pursuant to Section 7 of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. Section 621, et seq. and Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991.

10. Plaintiff seeks certification by this court to proceed as a collective action for the ADEA claims, pursuant to 29 U.S.C. Section 626 (b) which incorporates by reference Section 16 (b) of the Fair Labor Standards Act, 29 U.S.C. Section 216 (b). This action is sought on behalf of all employees of defendants over the age of forty (40).

COUNT I

Age Discrimination and Retaliation in Violation of ADEA

11. Plaintiff hereby incorporates paragraphs 1 through 10 of the Complaint, by reference, as if fully set forth in this Count I.

12. Plaintiff was born March 7, 1947, and has been employed by defendant GECC and its predecessor since June 10, 1968. Plaintiff currently holds the position of Facilities Manager.

13. On or about February 2,1996, plaintiff filed charges of age discrimination, and reverse race discrimination with Equal Employment Opportunity Commission ("EEOC"). The charge was assigned Charge No. 291960448. A copy of said charge is attached hereto as Exhibit "A" and is incorporated herein by reference. More than 180 days have elapsed since the filing of said charge and the EEOC has not been able to complete its investigation. Therefore, plaintiff requested his Notice of Right to Sue, which was received by plaintiff on or about August 20, 1996. The Notice of Right to Sue is attached hereto as Exhibit "B" and is incorporated herein by reference.

14. This action has been commenced by the filing of this Complaint within ninety (90) days after plaintiff's receipt of the aforesaid Notice of Right to Sue; therefore, plaintiff has duly met all administrative requirements of the ADEA.

15. At the time of defendants' unlawful conduct towards plaintiff, (and others similarly situated) and thereafter, defendants GECC and MWCS have retained and continued to employ persons younger than plaintiff in jobs for which plaintiff is and was qualified, and has employed African American males in jobs for which plaintiff is and was qualified.

16. Defendants GECC and MWCS have a well-established pattern and practice of "early-outing" or attempting to "early-out" older executives at or near plaintiff's level. It has been discovered that defendants have an express but covert policy of discriminating against older employees. Defendants' pattern and practice reflect that the older employees whose job performance are at levels that meet or exceed objective expectations are identified in writing by defendants and their representatives as "White Blockers" or "Blockers." See Ex. "C" (Chart identifying "Blockers" and describing characteristics). Defendants' use of the term "Blockers" means that the older Caucasian employees continued employment 'blocks" the promotions of younger and minority

"high potential' employees. Therefore, it became defendants and their representatives pattern and practice to force the older employees into early retirement by either down-grading the older employees performance or by eliminating their positions through so-called restructuring. See Ex. "D" (Reorganization Strategy).

17. From approximately March 1, 1990 to June 20, 1991, plaintiff held the position of Remittance Processing Manager at defendant GECC's Lombard Remittance Processing Center in Chicago, Illinois. Because of plaintiff's outstanding performance, plaintiff was asked by Stephen Joyce, President and CEO of defendant MWCS, to transfer to Hampton, Virginia to oversee the construction of a new building for GECC. However, prior to being transferred to Hampton, plaintiff had to interview for the position with the person to whom plaintiff would be reporting, defendant GECC's representative, Mike Case. During the interview process, Case stated to plaintiff that, "this department needs a black person and a woman in management, and you really don't fit the bill, but I'm going to give you a chance." Case did whatever he could to ensure that plaintiff would fail in the performance of his job duties. When plaintiff questioned Case about how Case was treating plaintiff, Case replied, "I told you, I'm looking for minorities and women, but I have to take you" Plaintiffs position was that of National Attorney-Agency Manager.

18. In approximately May, 1992, plaintiff received a new supervisor, Mary Kinsey, a GECC representative. In September or October, 1992 Kinsey assigned plaintiff a new assistant, Canton Benton, a 35-36 year old black male. Mr. Benton had less experience and was lesser qualified than plaintiff. In an attempt to undermine plaintiff's authority, defendant GECC's representative Kinsey began communicating directly with Mr. Benton when she wanted to know something instead of going to plaintiff. When it came time for performance evaluation, Kinsey gave Benton a higher

performance rating than plaintiff. This was done to set the stage for defendants and their representatives to discriminate against plaintiff.

19. In approximately March, 1993, defendant GECC's representative Kinsey telephoned plaintiff and advised plaintiff that she would like to phase plaintiff out of his position as National Attorney-Agency Manager and give plaintiff's job duties and responsibilities to Canton Benton. Plaintiff would be assigned "special projects." The term "special projects" is commonly referred to by employees of defendants as the "graveyard" or "kiss of death."

20. During the Spring of 1993, plaintiff continued to perform his job duties and responsibilities of "special projects." Upon development and implementation of these projects, defendant GECC's representative Kinsey would assign completion of the plans to Canton Benton. In addition, Kinsey began taking Mr. Benton with her when she visited clients. This gave the clients and other GECC employees the impression that Mr. Benton was responsible for the Hampton, Virginia unit.

21. In or around September 1993, plaintiff learned that he had been rejected for the open position of Regional Collection Manager in defendant GECC's Las Vegas, Nevada location for which he had previously applied. Plaintiff was qualified for this position based on his prior experience in collections. Plaintiff learned Justin Boyle, a younger, lesser experienced, lesser qualified individual received the position.

22. In approximately February 1994, defendant GECC's representative Kinsey advised plaintiff that defendant GECC would be announcing in April, 1994 that defendant GECC's Hampton location would be closing around September 15, 1994. Kinsey asked plaintiff to take on a "special project" that involved building a new unit for GECC in Lenexa, Kansas. Plaintiff asked Kinsey if he would still have his position as National Attorney-Agency Manager after he completed the

Lenexa project. Kinsey replied, "we'll see." Plaintiff transferred to Lenexa, Kansas and learned that Canton Benton was assigned the position of Acting National Attorney-Agency Manager until the Hampton location closed on September 15, 1994.

23. On or about September 15, 1994, Carlton Benton was transferred by defendant GECC to defendant's MWCS's Merriam, Kansas location. Mr. Benton was given the title of National Attorney-Agency Manager. This is the same position plaintiff had previously held in Hampton, and plaintiff received the title of Vice President of Special Projects.

24. On or about January 31, 1995, plaintiff completed defendant GECC's Lenexa facility. Plaintiff was then given the title of Manager of Specialized Collections. Plaintiff continued to work at defendant GECCs Lenexa facility until July, 1995, when he was approached by defendant GECC's President and CEO, John Wilson. Wilson asked plaintiff to build a new remittance processing center for GECC in Addison, Illinois. Thereafter, plaintiff talked with and wrote letters to several of his superiors and expressed his interest in managing the unit in Illinois once it was built. However, on or about August 21, 1995, plaintiff learned that Steve Pollack, a younger individual, who had no more experience and was no more qualified than plaintiff had been hired from the outside. This was the same position plaintiff had held when plaintiff was assigned to GECC's Lombard facility in Chicago during 1990-1991.

25. During this same time, plaintiff learned that a position for Remittance Processing Center Manager had come open in GECC's Grand Prairie, Texas location. Plaintiff was exceptionally qualified for the position. But, in early November, 1995, plaintiff again learned that Brett Plymyer, a younger individual, with lesser experience and lesser qualifications than plaintiff had been hired from outside

GECC. Plaintiff had not even been considered for the position.

26. During December, 1995 and January, 1996, plaintiff continued to be told by his supervisors and defendants' representatives that there was no permanent position available for plaintiff within GECC. During this same time, Canton Benton was transferred from defendant MWCS's Merriam, Kansas location to defendant GECC's Canton, Ohio facility, leaving the position for National Attorney-Agency Manager open in MWCS's Merriam, Kansas facility. Plaintiff requested his old position back but has been told "there is no job for you in Kansas." In addition, plaintiff learned that a position of Vice President of Recovery Collections, the same position plaintiff had held in defendant GECC's Hampton facility, was accepted by John Deets, a younger individual with lesser experience and lesser qualifications than plaintiff.

27. In addition to the above, defendants rank their employees performance by placing employees in Bands I through V, Band V being the highest an employee can receive. Defendants' pattern and practice is to rank their younger and/or younger minority employees in the higher Bands, which in turn allow defendants to justify paying the younger, lesser experienced and lesser qualified individuals higher salaries than the older employees. Also, in periods of reorganizations, lay offs, restructurings, etc. defendants protect their younger employees by this artificially higher banding.

28. Since the filing of plaintiff's charge of discrimination with the EEOC on or about February 2, 1996, defendants have retaliated against plaintiff by having its representatives and employees shun plaintiff in the following respects: by not talking to plaintiff, failing to include plaintiff on company documents plaintiff had always received in the past, and failing to present plaintiff with his written performance appraisal for the year 1995.

29. At the time of the actions taken by defendants against plaintiff, and others similarly situated, defendants retained and continued to employ and rehire/hire persons younger than plaintiff; and others similarly situated, in jobs for which plaintiff was qualified, and plaintiff has made it known to defendants' agents his interest in alternative positions and younger employees were transferred to different jobs.

30. The actions of defendants, as noted above toward plaintiff, and others similarly situated, have been continuously discriminatory and retaliatory, arbitrary and capricious, and constituted a disparity in treatment toward plaintiff, and others similarly situated, and unlawful employment practices in violation of the ADEA, 29 U.S.C. Section 621, et seq.

31. The actions of the defendants were willful, calculated toward plaintiff and others similarly situated, or were in reckless disregard of his rights, and as such, constituted willful violations of the ADEA, 29 U.S.C. Section 621, et seq.

32. The actions of the defendants toward plaintiff and other persons within the protected class under the ADEA, evidenced a pattern and practice of willful discrimination and retaliation in violation of the provisions of the ADEA, 29 U.S.C. Section 621, et seq.

33. Plaintiff, and others similarly situated, have been monetarily damaged by defendants' unlawful employment practices, including its violation of the ADEA.

34. As a direct and proximate result of defendants' unlawful violation of plaintiff's, and others similarly situated, rights, as alleged above, plaintiff, and others similarly situated, have suffered substantial actual damages, including, but not limited to, lost income and employee benefits, humiliation, mental distress, career disruption, substantial loss in salary, and other fringe benefits, all in an amount which cannot be ascertained precisely at this time, but which will be established in the course of discovery of comparative data regarding earnings

and benefits by other employees. Plaintiff, and others similarly situated, allege on information and belief that they have each suffered monetary losses for back-pay, future pay, and other losses, in the approximate amount of $100,000, or more, apiece.

35. Plaintiff, and others similarly situated, also are entitled to liquidated damages for willful violation of the ADEA, in an amount equal to all actual damages.

WHEREFORE, plaintiff, and other similarly situated, pray as follows:

a. That the Court adjudge and decree, after jury trial, that defendants have discriminated and retaliated against plaintiff, and others similarly situated, on the basis of their age, and that said actions by defendants were willful violations of the ADEA, 29 U.S.C Section 621, et seq.:

b. That after jury trial, the Court order defendants to reinstate plaintiff; and others similarly situated, immediately to their former positions, with all appropriate increases in salary and benefits, or reasonable award as front pay until at least age 70, as if they had been working in their positions.

c. That after jury trial, the Court order defendants to pay liquidated damages in an amount equal to plaintiff's, and others similarly situated, actual damages as found by the jury for defendants' willful violations of the ADEA;

d. That after jury trial, the Court allow plaintiff, and others similarly situated, their costs incurred herein, including reasonable attorneys fees and all other costs and expenses of litigation;

e. That after jury trial, the Court allow plaintiff, and others similarly situated, prejudgment interest on all back-pay and benefits found by the jury to be due and owing through date of trial;

f. That after jury trial, the Court grant such additional affirmative relief as the Court may deem just and proper.

COUNT II

Reverse Race Discrimination In Violation of 42 U.S.C. Section 2000(e) et seq. By the Civil Rights Act of 1991

36. Plaintiff hereby incorporates paragraphs 1 through 35 of the Complaint, by reference, as if fully set forth in this Count I.

37. In addition to the above discriminatory and retaliatory conduct, plaintiff was told by defendant GECC's representative Mike Case in 1991 that he did not want plaintiff to have the position of National Attorney-Agency Manager because Case wanted a black person or woman in management.

38. Defendants GECC and MWCS discriminated and retaliated against plaintiff on the basis of his race, Caucasian, by demoting plaintiff, who was older and more experienced than his African-American counterpart, Canton Benton.

39. In approximately September, 1993, plaintiff, while still Canton Benton's supervisor, received a complaint against Canton Benton for sexual harassment. Plaintiff reported this complaint of sexual harassment to his supervisor and GECCs representative, Mary Kinsey. Kinsey ordered plaintiff to keep this quiet. Kinsey advised plaintiff she did not want the Vice President of Human Resources, Jeff Faucette, to know anything about this as "it could ruin Canton's career."

40. Thereafter, defendants continued to discriminate and retaliate against plaintiff when defendants refused to reappoint plaintiff to his former position of National Attorney-Agency Manager after Mr. Benton was transferred from MWCS's Merriam, Kansas location to another of defendant GECCs facilities.

41. As mentioned earlier, defendant GECC and MWCS have a well-established pattern and practice of "early-outing" or attempting to "early-out" older Caucasian executives at or near plaintiff's level. It has been discovered that defendants have an express but covert policy of discriminating against older Caucasian employees. See Ex. "E", chastising certain divisions of the company for its percentages as relates to minorities. Defendants' pattern and practice reflects that the older Caucasian employees whose job performance are at levels that meet or exceed objective expectations are identified in writing by defendant and its representatives as "White Blockers" or "Blockers." Defendants' use of the term "Blockers" means that the older Caucasian employees continued employment "blocks" the promotions of younger and minority "high potential" employees. Therefore, it became defendants and their representatives pattern and practice to force the older Caucasians into early retirement by either down-grading the older employees performance or by eliminating their positions through so-called restructuring.

42. At the time of the actions taken by defendants against plaintiff, defendants retained and continued to employ younger Caucasian employees in jobs for which plaintiff was and is qualified.

43. The actions of defendants were willful, intentional, malicious and with reckless indifference to the rights of plaintiff violating Title VII and 42 U.S.C. Section 1981, and entitling plaintiff to punitive damages.

44. As a direct and proximate result of defendants' unlawful acts, plaintiff has suffered economic loss in the form of lost wages, lost benefits, harm to plaintiff's possibilities for career advancement, lost pension and other fringe benefits, and non-economic loss in the form of embarrassment, humiliation and anxiety, inconvenience and mental anguish, all in an amount which cannot be ascertained precisely at this time, but will be established in the course of discovery of comparative data

regarding other employees. Plaintiff alleges on information and belief past and future monetary losses, and prejudgment interest in the approximate amount of $300,000, or more.

45. Plaintiff also in entitled to compensatory damages for pain and suffering, loss of enjoyment of life, humiliation, mental distress and anxiety, and inconvenience, and punitive damages for defendants' reckless indifference to plaintiff's civil rights, all in an amount exceeding $300,000. Plaintiff alleges defendants employ more than 500 employees so as to be subject to the $300,000 cap on compensatory and punitive damages under Title VII.

WHEREFORE, plaintiff prays the following:

(a) That the Court adjudge and decree, after jury trial, that defendants have discriminated and retaliated against plaintiff based on race, Caucasian.

(b) That after jury trial, the Court enter judgment for all compensatory and punitive damages awarded by the jury;

(c) That after jury trial, the Court order defendants to reinstate plaintiff immediately to his former position with all appropriate increases in salary and benefits, or in lieu of reinstatement, order defendants to pay plaintiff a reasonable award allowed by law for his future economic losses in the approximate amount of $300,000, plus prejudgment interest on all back-pay found by the jury to be due and owing through date of trial;

(d) That after jury trial, the Court grant a permanent injunction enjoining defendants from engaging in any employment practice which discriminates and/or retaliates against employees, including plaintiff, because of his race, Caucasian;

(e) That after jury trial, the Court allow plaintiff his costs incurred herein, including reasonable attorneys fees, and all other costs and expenses;

(f) That after jury trial, the Court grant such additional affirmative relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial on all issues so triable.

THE POPHAM LAW FIRM, P.C.

By: /s/_____
BERT S. BRAUD - KS 14223
1300 Commerce Trust Building
922 Walnut Street
Kansas City, MO 64106
(816) 221-2288
Fax: 221-3999

ATTORNEYS FOR PLAINTIFF

Supreme Court, U.S.
FILED
FEB 8 2002

No. 01-881

IN THE

Supreme Court of the United States

GENERAL ELECTRIC CAPITAL CORP. and
MONTGOMERY WARD CREDIT SERVS., INC.,

Petitioners,

v.

GARY A. THIESSEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

JOHN M. KLAMANN
DIRK HUBBARD
KLAMANN & HUBBARD
7101 College Boulevard
Suite 120
Overland Park, KS 66210
(913)327-7600

BERT S. BRAUD*
DENNIS E. EGAN
THE POPHAM LAW FIRM, P.C.
323 West 8th Street
Suite 200
Kansas City, MO 64105
(816)221-2288

Attorneys for Respondent

* *Counsel of Record*

172272

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Introduction	1
Brief Statement of the Facts	3
Reasons for Denying the Writ	3
I. There is no "Mature Circuit Split" as to a trial court's authority to weigh evidence and make factual findings.	3
II. There is no "Mature Split" on the application of *Teamsters*.	10
III. The Tenth Circuit is not in conflict with other Circuits on the timeliness issue.	15
Conclusion	18

TABLE OF CITED AUTHORITIES

Page

Adams v. Ameritech Services, Inc., 231 F.3d 414 (7th Cir. 2000) 7

Ardrey v. United Parcel Service, 798 F.2d 679 (4th Cir. 1986) 14

Coates v. Johnson & Johnson, 756 F.2d 524 (7th Cir. 1985) 14

Grayson v. K Mart Corp., 79 F.3d 1086 (11th Cir. 1996) 10

Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208 (11th Cir. 2001) 17

In re Beverly Hills Fire Litigation, 695 F.2d 207 (6th Cir. 1982) 13

In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995) 4

Malcom v. National Gypsum Co., 995 F.2d 346 (2d Cir. 1993) 13

Mooney v. Aramco Services Co., 54 F.3d 1207 (5th Cir. 1995) 9

National Railroad Passenger Corp. v. Morgan, 121 S. Ct. 2547 (2001) 16, 18

Cited Authorities

Page

Rutstein v. Avis Rent-A-Car Systems, Inc., 211 F.3d 1228 (11th Cir. 2000) 11, 12, 15

Smith v. Texaco, Inc., __ F.3d __, 2002 WL 131415 (5th Cir. 2002) 11

Smith v. Texaco, Inc., 263 F.3d 394 (5th Cir. 2001) 11, 15

Stastny v. Southern Bell Telephone & Telegraph Co., 628 F.2d 267 (4th Cir. 1980) 8

Szabo v. Bridgepost Machines, Inc., 249 F.3d 672 (7th Cir. 2001) 4, 5, 7, 8

Western Elec. Co., Inc. v. Stern, 544 F.2d 1196 (3d Cir. 1976) 14

Windham v. American Brands, Inc, 565 F.2d 59 (4th Cir. 1977) 15

Statute:

29 U.S.C. § 216(b) 2, 8

Rules:

Fed. R. Civ. P. 12(b)(6) 5

Fed. R. Civ. P. 23 ..... *passim*

Fed. R. Civ. P. 23(b)(2) 11, 12

INTRODUCTION

In February of 1998, the trial court found that Respondent had "come forward with direct evidence of an overall policy of purported age discrimination." Pet. App. 120a. That direct evidence has never been shown to a jury. This Court can not bring finality to the case, whether it grants certiorari or not. This Court's decision on the petition for writ of certiorari, one way or the other, is only one step, taken somewhere in the middle of this case's existence — not at the end. This case is still on the vine, a long way from the ripeness required for review by this Court.

Petitioner has filed its petition for writ of certiorari following the Tenth Circuit Court of Appeal's unremarkable reversal of the grant of summary judgment by the trial court. No trial has occurred yet. No final ruling has been made. Any ruling by this Court will not bring finality to the case. Because of concerns relating to statues of limitations, five related lawsuits are pending in four different circuits. If the Court denies certiorari, as it should, those five lawsuits will continue to be stayed, pending the resolution of the matter in the District of Kansas, where this case originated and where it should be allowed to proceed to conclusion. The law and facts of this case are not fully developed, and will not be unless and until this case reaches a trier of fact, whether in the District of Kansas, or elsewhere.

Further, this case is not of general significance. Rather, it is the appeal of an isolated defendant in a fact specific case seeking reversal of the run-of-the-mill decision that the case should go to trial. The only people with any interest in this case are 28 individuals and one company. Beyond that, this case has no impact on anyone else, and particularly

no impact on class actions or the judicial process. By inaccurately characterizing this opt-in ***ADEA/FLSA collective action*** as a ***Rule 23 class action***, petitioner seeks to impress upon this Court an urgency that simply does not exist. If, as petitioner suggests, the law regarding Rule 23 class actions someday might require the attention of the highest Court in this country, the vehicle to address those concerns should rightfully be an actual Rule 23 class action — not this ADEA collective action.

Where the overwhelming majority of petitions reviewed by this Court present no questions warranting certiorari, Petitioner here claims that this case presents no less than three "enormously important" questions. As noted, this is not even a class action case, at least in the terms described by the petitioner. This is a 216(b) collective action, under the FLSA and the ADEA. It is not, never has been and never will be a Rule 23 class action. Thus, all the Rule 23 cases and class action statistics, relied upon by petitioner, have virtually no application here. Second, the number of claimants in this case is, by any standard, small. There are only 28 total members of this opt-in collective action (there were originally 31, but three have dismissed their claims). As such, the "sky is falling" claims of petitioner are unrealistic, contrived, and hyperbolic. Given the relatively small numbers, case management is not a real issue, but a red herring invented by the petitioner, and this Court need not waste its valuable time. Significantly, the procedural posture of this case makes it a poor candidate for certiorari review.

BRIEF STATEMENT OF THE FACTS

Respondent brought this case as an opt-in collective action, pursuant to the ADEA and FLSA, alleging that he and others similarly situated were the victims of a pattern and practice of age discrimination. Over the course of discovery, respondent amassed hundreds of documents, and thousands of pages of deposition testimony, which ultimately led the trial court to its conclusion that respondent had done more than make mere allegations, but had come forward with "direct evidence of an overall policy of purported age discrimination." Some of that evidence is mentioned below in respondent's comparison of this case, and its fact-intensive posture, to cases cited by the petitioner.

REASONS FOR DENYING THE WRIT

I. There is no "Mature Circuit Split" as to a trial court's authority to weigh evidence and make factual findings.

A.) Petitioner complains that there is a split among the circuits on the issue of whether a trial court can review the merits of a claim in certification decisions, and make findings of fact in that context. There is no split of authority in this area — the context and level of fact finding endorsed by petitioner is not supported by any circuit, much less the Tenth.

It is one thing to examine the merits of a class action in the context of examining the requirements of Rule 23 — are there enough claimants to satisfy the numerosity requirement, for example? It is another thing altogether to examine the ultimate question — was there discrimination? No circuit court has ever held that such fact finding is permissible.

This is critical in this case, because the trial court here found such an ultimate fact — that the petitioner had "repudiated" what the trial court had earlier described as "an overall policy of purported age discrimination." The trial court used that factual determination — that there had been a repudiation — as a cornerstone for its subsequent erroneous rulings decertifying the collective action and granting summary judgment on the individual claims of Gary Thiessen.

The cases relied upon by petitioner do not expose a "mature split" among the circuits. There is no conflict, for example, between the Tenth Circuit's opinion and *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995). That opinion does not address the issue here regarding a district court's authority to engage in fact finding. Rather, that opinion deals with class certification in "mass tort" litigation, where tens of thousands of claimants, in 50 states with different common laws, made claims of negligence against an entire industry. In dicta, at 1298, the *Rhone-Poulec Rorer* opinion makes "guesses" at the merits of the claim "[f]or the ***limited purpose*** of comparing the situation that will face defendants if the class certification stands." *Id.*, emphasis added. In no way does the opinion suggest (much less hold) that a trial court is entitled to weigh evidence regarding the ultimate facts of the case.

Likewise, there is no conflict between the Tenth Circuit's opinion and *Szabo v. Bridgepost Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001). The *Szabo* case has nothing to do with the issues here. Among other things:

- *Szabo*, like *Rhone-Poulc Rorer*, is a Rule 23 class, not a 216(b) class.

- Plaintiff in *Szabo* complained of breach of warranty and fraud in the sale of a machine; the Seventh Circuit noted early in the opinion that class actions for breach of warranty and fraud pose "serious problems about choice of law, the manageability of the suit, and thus the propriety of class certification." *Szabo*, 249 F.3d at 674.

- Fraud cases — totally unlike the blocker policy and MDP program clearly shown to affect respondents here — include issues of who made what representations to whom, when and where. There is no such problem here, as the Tenth Circuit found.

- In *Szabo*, dealers of the product in question were located in different states, saying different things to different people about different uses and applications of the machine. *Id.*

- The district court in *Szabo* evaluated the complaint under a Rule 12(b)(6) standard, believing that it must accept all of plaintiff's allegations in the complaint as true. *Id.*, at 675. Thus, the "fact finding" in *Szabo* was in an entirely different context.

The Tenth Circuit, if faced with the far different facts of *Szabo*, would reach the exact same conclusion. The *Thiessen* case, in stark contrast to *Szabo*, was not ruled on a motion to dismiss a Complaint, but involves over one year of heavy discovery, tens of thousands of documents, over 40 depositions, and numerous rounds of written discovery, interrogatories and briefing. The *Szabo* trial court reached

conclusions based only on allegations in a Complaint. As the Tenth Circuit aptly quoted (from the trial court's opinion):

> Mr. Thiessen has ***not simply averred the existence of a discriminatory policy*** or merely argued that circumstantially one should infer its existence by virtue of numerous people in the protected category having incurred adverse employment actions. ***Instead, he has come forward with direct evidence of an overall policy of purported age discrimination.***

Pet. App. 120a, emphasis added. The meaty, fact-bound evidentiary record presented to and studied by the Tenth Circuit is voluminous and ready for trial. It is far stronger than *any* case petitioner has ever or could ever cite, and includes, ***among other things***,

- Prepared lists of "blockers" that include calculations of the costs associated with terminating the "blockers" (Response to Appellee's Petition for Rehearing with Suggestions for Rehearing en banc, Tab 1);

- Memos regarding the implementation of the discriminatory "blocker policy" (*Id.*, Tab 2);

- Slide Shows detailing steps to be taken with "blockers" (i.e. eliminating positions, early retirement, or simply moving younger employees around the "blockers") (*Id.*, Tab 3);

- Testimony from "insider" HR representatives, describing their protests that the proposed plan was age discrimination. (See R.O.A., App. 10, depositions of Thomas and Wolf)

- Agendas of meetings where Blocker Strategy was discussed (Response to Appellee's Petition for Rehearing with Suggestions for Rehearing en banc, Tab 4);

- A series of e-mails identifying certain plaintiffs as "blockers" targeted for termination (*Id.*, Tab 5);

- Presentations describing actual implementation of the plan, indicating that "two blockers were separated" (Defendants deny ever implementing the program) (*Id.* Tab 6);

- An affidavit (apparently ignored by the District Court) from high-level GECC executive Rick Richards describing the ageist culture at GECC (*Id.*, Tab 7); and

- An e-mail from a distressed HR manager concerned that she "knew too much" about the ageist activity and subsequent attempt at cover up. (*Id.*, Tab 8).

Obviously, unlike *Szabo*, the evidentiary record in this case (most of it "disputed" by petitioner) goes far beyond mere "allegations" in a complaint. As the Tenth Circuit properly analyzed the facts under established controlling law, the District Court erred in resolving the merits without a trial. *See Adams v. Ameritech Services, Inc.*, 231 F.3d 414 (7th Cir. 2000) (also reversing and remanding for trial ADEA collective action).

The *Szabo* opinion gives examples of when routine procedural, ***non-merits*** fact finding is permissible, e.g. where the plaintiff alleges 10,000 class members, and the defendant

says there are only 10, a court can make "findings" on the issue of numerosity. 249 F.3d at 676. So also the trial court can make fact findings as to subject matter jurisdiction, or whether *forum non conveniens* applies. *Id. Szabo* (and each case addressing the issue) speaks in terms of the court making a "*preliminary inquiry* into the merits,"or "going beyond the pleadings." That unremarkable law is perfectly consistent with this decision. No court ever has held that the district court has the power to make the ultimate findings regarding the ultimate fact — whether a policy of discrimination (for which the district court acknowledges direct evidence) was actually implemented against an individual employee.

Petitioner also claims that the Fourth Circuit's opinion in *Stastny v. Southern Bell Telephone & Telegraph Co.*, 628 F.2d 267 (4th Cir. 1980) conflicts with this case. The date of the opinion is noteworthy — the case pre-dates passage of the Civil Rights Act of 1991, and therefore the case was tried to the court. The fact that the case ***went to trial***, in and of itself, distinguishes it from this case. A proper finder of fact was presented with evidence to determine whether a pattern and practice existed. Further, that opinion discusses the findings, ***at trial*** (where fact finding is appropriate), necessary to determine whether commonality and typicality exist — elements of a Rule 23 class, but not a 216(b) "similarly situated" class. Since the case was tried to the Court, of course it was permissible for the Court to make factual determinations concerning class requirements. And since the case actually went to trial, those determinations were made at the proper stage (even though the appellate court ultimately determined that the findings were unsupported by the evidence at trial).

Similarly, *Mooney v. Aramco Services Co.*, 54 F.3d 1207 (5th Cir. 1995) is not in conflict. *Mooney* involves 154 opt-in plaintiffs, in 93 different departments, in 11 separate locations in Saudi Arabia. Plaintiffs were alleging "297 separate RIF's of expatriate employees." 54 F.3d at 1215. The court in *Mooney* simply said, "We cannot say the district court abused its discretion in finding that the opt-in plaintiffs were not similarly situated." *Id.*, at 1216. The court added: "In so holding, we specifically *do not* endorse the methodology employed by the district court and *do not* sanction any particular methodology."

B.) This is not a "recurring problem," as suggested by the petitioner. First, petitioner claims that it has looked at the ". . . most recent available statistics," the *Judicial Business of the United States Courts: 1998 Report of the Director*, Tables X-4 and X-5. (Pet. p. 14) However, an analysis of that report, along with the same reports *for the years 1999 and 2000* (for some reason not mentioned by petitioner), dispel petitioner's concerns. While it is true that, in 1998, over 1,800 class actions were filed, *only 85* of those cases were employment discrimination cases, amounting to *less than 5% of all class actions*. Of the more than 3,000 class actions that were pending, 71 were employment discrimination cases — *less than 3% of all class actions*. The next year, the number of class action filings went up (from 1,881 to 2,133), *while the number of employment discrimination class actions dropped (from 85 to 74). Judicial Business of the United States Courts: 1999 Report of the Director*, Tables X-4 and X-5. In 2000, the number of class actions rose again by over 200 (from 2,133 to 2,393), but the number of employment discrimination class actions rose only 5 (from 74 to 79). *Judicial Business of the United States Courts: 2000 Report of the Director*, Tables X-4 and X-5.

Even with that small increase, the *employment discrimination class action filings in 2000 were fewer than in 1998.*

Petitioner's reliance on dated statistics, especially when more recent contrary figures are available, is dubious at best. If there is a trend at all, it is toward fewer — not more — employment discrimination class actions. There is no need for this Court to stem some imaginary tide of growing class action litigation under Rule 23. And more to the point: the statistics have no bearing on a simple reversal of summary judgment in an as-yet untried 28 person opt-in ADEA case.

II. There is no "Mature Split" on the application of *Teamsters*.

A.) First, there is no split of authority in FLSA Rule 216(b) cases — the only supposed "split" identified by petitioner is in Rule 23 class action cases, which specifically do not apply to collective actions. *See, e.g., Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096, n.12 (11th Cir. 1996). In particular, the split complained of by petitioner generally involves cases where compensatory damages are at issue. In this ADEA case, compensatory damages are unavailable. As such, this case is not the proper vehicle for resolving that "split." The Tenth Circuit correctly noted in its opinion that the standard to be used in certification decisions is a "similarly situated" standard, not a Rule 23 commonality or typicality standard. Pet. App. 13a. As such, all the Rule 23 cases relied upon by the petitioner have limitation application here, if any. In a desperate attempt to manufacture a "mature circuit split", petition has used Rule 23 cases — and in many instances, non-employment discrimination Rule 23 cases — to address a circumstance where Rule 23 does not apply.

Furthermore, many of the employment cases relied upon by petitioner are brought under the Civil Rights Act of 1991, which not only provides for compensatory damages not available under the ADEA, but which also involve a more detailed analysis of Rule 23 requirements, relating to not only to commonality and typicality, but the availability of injunctive relief, such as a Rule 23(b)(2) class.

The first "conflicting case" cited by petitioner, *Smith v. Texaco, Inc.*, 263 F.3d 394 (5th Cir. 2001) no longer presents a conflict — the opinion was withdrawn by the Fifth Circuit on February 1, 2002 (see, *Smith v. Texaco, Inc.*, __ F.3d __, 2002 WL 131415 (5th Cir. 2002).[1]

Petitioner also claims a conflict with *Rutstein v. Avis Rent-A-Car Systems, Inc.*, 211 F.3d 1228 (11th Cir. 2000). However, that case specifically states that ***it is not*** a *Teamsters* case. In fact, it supports the application of *Teamsters* in employment discrimination cases:

> The *Teamsters* rationale is particularly appropriate in employment discrimination cases because of the relationship between a finding of systemic disparate treatment by an employer, and a plaintiff's burden under *McDonnell Douglas* to establish a prima facie case of individual disparate treatment. After a pattern or practice of discrimination has been proven, *Teamsters* mandates that in order to gain individual relief

---

1. Given the strong dissenting opinion in *Smith*, the fact that the mandate had been held by one or more judges, and the fact that a response to the en banc petition had been requested, the possibility existed that *Smith* would not only have been withdrawn, but reversed.

> plaintiffs must come forward and "show that [they] unsuccessfully applied for a job."

Rutstein, 211 F.3d at 1237-38, citing *Teamsters*, 431 U.S. at 362. The court noted that the individuals are never relieved of their burden of ultimately showing individual discrimination, but the plaintiffs "are relieved of the prima facie burden of demonstrating that they were qualified for the job at issue in subsequent individual proceedings." *Rutstein*, 211 F.3d at 1239. The court then noted the distinction between *Teamsters* and the case before it — in *Rutstein*, plaintiffs had to prove an intent to discriminate on the basis of race, a requirement "more demanding than any of the requirements imposed on plaintiffs in a *McDonnell Douglas* case, requiring as it does, that the plaintiff bring forth evidence of actual intent on the part of the defendant." *Id. Rutstein* noted that the requirement that an individual demonstrate that he or she is qualified for a job under *McDonnell Douglas* is not particularly rigorous, but the same did not hold true where, in *Rutstein*, Avis may have refused to contract with a plaintiff for any number of reasons having nothing to do with plaintiff's ethnicity. *Id.*

The *Rutstein* opinion, cited as conflicting with the Tenth Circuit opinion here, actually provides an excellent analysis of why employment discrimination class actions ***are different*** from other class actions. This analysis underscores that there is no conflict between the cases, but rather, a critical distinction between them, which favors a *Teamsters* approach in one but not the other.

Petitioner also cites other Rule 23(b)(2) cases, which are inapposite here, as noted. The fact remains that this case is an ADEA collective action, not subject to a Rule 23 analysis, without claims for compensatory damages.

B.) The Tenth Circuit's decision is not severely flawed. First, the Tenth Circuit never declared that plaintiffs should be ensured a procedural advantage. The Tenth Circuit simply held that, ". . . if plaintiffs were to establish a pattern or practice of discrimination, they would be entitled to a presumption that the individual employment actions taken against them were the result of such discrimination." (Pet. App. 42a) The Court was ensuring plaintiffs nothing. Indeed, as a case management tool in this small, 28 member class, a multi-stage procedure is far more efficient than the alternative, five lawsuits in four federal courthouses, trying the same facts and evidence to five different juries. The petitioner's claims of case management nightmares may be reasonable where a defendant is faced with hundreds or thousands of class members, but it is unconvincing here, where the numbers are small. It is ludicrous to suggest that 28 claimants presents case management problems.

Second, the Tenth Circuit "did not even address" constitutional concerns because there are none to address. Petitioner begins its constitutional argument by citing mass tort cases, for the proposition that a multi-stage *Teamsters* trial somehow denies the defendant its constitutional rights. *Malcom v. National Gypsum Co.*, 995 F.2d 346 (2d Cir. 1993) is an asbestos mass tort case, consolidating the claims of 600 plaintiffs against between 14 and 42 manufacturers of asbestos products. *In re Beverly Hills Fire Litigation*, 695 F.2d 207 (6th Cir. 1982) was a case brought by surviving family members against manufacturers of aluminum wiring, alleged to have caused a fire that resulted in the deaths of 165 people, and injury to many more. Both cases involve large numbers of claimants taking on entire industries. Neither case applies to this 28 plaintiff pattern and practice employment discrimination case. Petitioner, through creative

use of ellipses, even goes so far as to suggest that *Beverly Hills* was a pattern and practice case (Pet. 22); the irony is that the case ultimately *upheld the very bifurcation that petitioner now calls unconstitutional.*

Petitioner's next argument is that individualized issues are properly addressed in the first phase of trial. That is wrong. *Ardrey v. United Parcel Service*, 798 F.2d 679 (4th Cir. 1986), is a Rule 23 case appealed *on discovery issues*. (*Id.*, 798 F.3d at 680). "The instant appeal concerns the district court's handling of the discovery phase of the case." *Ardrey*, 798 F.2d at 684. That case decided only whether the trial court had been too restrictive in discovery by refusing the plaintiffs discovery on evidence of a pattern, limiting discovery instead to individualized claims. Ultimately, *Ardrey* held that individualized defenses **may** defeat a class claim, but **not necessarily**. *Ardrey* concluded that rebuttal of each alleged instance of discrimination "weakens but does not defeat" a class claim. *Ardrey*, 798 F.2d at 680. As such, that Fourth Circuit case creates no conflict here.

Coates v. Johnson & Johnson, 756 F.2d 524 (7th Cir. 1985), was bench tried — not in phases, but all at once. Because the case was *not* separated into different phases, obviously individualized defenses were presented *at trial*. Nevertheless, *Coates* cited *Teamsters* for its rule that, in pattern and practice cases, the **focus** often will not be on individual employment decisions, "**but on a pattern of discriminatory decision-making**." *Coates*, 756 F.2d at 532, citing *Teamsters*, 431 U.S. at 360, n.46. The Third Circuit case relied upon by petitioner, *Western Elec. Co., Inc. v. Stern*, 544 F.2d 1196 (3d Cir. 1976), predates *Teamsters*, and cannot be relied upon here, especially where more recent cases control. Again, no conflict exists.

Finally, petitioner cites *Windham v. American Brands, Inc*, 565 F.2d 59 (4th Cir. 1977) as being in conflict with the Tenth Circuit's opinion here. *Windham* is an anti-trust case, where the crux of the action is individual injury; thus while such a case may present a common question of violation, issues of injury and damage remain critical and are always strictly individualized. That case involved as many as 20,000 class members, and thousands of sales during four marketing seasons, and would have require individual proof of each. Likewise, the other Rule 23 class cases cited by petitioner (*Smith, supra* has been withdrawn by the Fifth Circuit; *Rutstein, supra*, involves individual compensatory and punitive damages) are not in conflict with the holding of the Tenth Circuit.

III. The Tenth Circuit is not in conflict with other Circuits on the timeliness issue.

First, the Tenth Circuit made *no final ruling* concerning the inclusion of anyone in the class beyond Thiessen, and the issue is not ripe for review by this Court. The Tenth Circuit deferred ruling on the issue, leaving it to the second stage: "Until the first stage is resolved, we question whether it is proper for a court to consider summary judgment motions regarding second stage issues (i.e. whether individual plaintiffs are entitled to relief)." (Pet. App. 20a) The opinion specifically left such determinations to the second stage of the proceedings — indeed, the opinion did not even establish the appropriate time frame for the claims, but held that the jury in the first stage would make findings on whether the ageist policy was implemented, and if so, how long it lasted. (Pet. App. 23a, n.12). Those findings would then help determine who would be included in the final class for the second stage. As such, the issue is far from being ripe.

The Tenth Circuit properly refused to engage in discussion of the merits or application of the continuing violation theory. Obviously this issue will arise in the pretrial, trial and post-trial stages. Petitioner improperly asks this Court to use this innocuous case — with no final holding regarding continuing violations — as a springboard to "clear up" supposed conflicts among the various circuits. As this opinion does not even pass on the efficacy or merits of the doctrine, it is not the proper vehicle for the requested broad review of continuing violation law.

Furthermore, there is no reason to delay the denial of a writ of certiorari based on other decisions this Court may make. The continuing violation theory is applied if there exists **either** a serial violation — a series of related acts, one or more of which are within the limitations period — or a systemic violation — a systemic policy or practice of discrimination that operated in part within the limitations period. The Tenth Circuit noted that the respondent was pursuing a pattern and practice case; thus the second approach applied, i.e. the systemic program theory. The case now before the Court, *National Railroad Passenger Corp. v. Morgan*, 121 S. Ct. 2547 (2001), is an individual plaintiff case (not a pattern and practice case), alleging a serial (rather than systemic) violation, and therefore offers no reason for delaying denial of certification.

A.) There are no splits of authority on this issue. First, even assuming the *National Railroad Passenger Corp. v. Morgan* case would apply here, there is no reason to delay the denial of certiorari here — the application of the continuing violation to the facts of this case, as noted earlier, will not even be made until after success by respondents at the first stage. In fact, if **petitioner** is successful at the first

stage, the issue is mooted altogether. In any case, this is not the vehicle for resolving the supposed split — the issue is barely (if at all) framed by the Tenth Circuit' opinion for review by this Court. The resolution of this split should come from a case where the issues are central, ripe and properly framed.

Second, petitioner misstates the Tenth Circuit's holding in this case. The Tenth Circuit has not "resurrected" other plaintiff's stale claims. In fact, whether or not they are stale has not even been determined, and will *not* be until resolution of first stage issues, including the time frame of the systemic policy of discrimination. As such, the imagined split on this issue is not presented by this case. Simply put, there is *nothing* in the Tenth Circuit's opinion that is contrary to cases in any other circuit.

Petitioner cites *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208 (11th Cir. 2001) as being in conflict. There is nothing in the Tenth Circuit's opinion here that conflicts with *Hipp* at all. *Hipp* stands for the proposition that, before the continuing violation will apply, there must be an act of discrimination within the statutory time period; the law in the Tenth Circuit is the same, and this case did nothing to change that. In fact, the Tenth Circuit's opinion here acknowledged *Hipp* with regard to the two-tiered approach to certification (Pet. App. 34a, n.4); had there been a split in the cases, such a conflict would have been addressed.

B.) The Tenth Circuit did not "extend" the continuing violation doctrine. As noted, there has been no trial, so there is no urgency here. The Tenth Circuit has not extended the continuing violation doctrine, as suggested by petitioner. Further, since this Court has already granted certiorari in

National Railroad Passenger Corp. v. Morgan, the issue will be resolved. Whatever the outcome of that case, it certainly will be applied in this case by the trial court, at the appropriate time, i.e. the second phase of the trial. At that time, petitioner will have the opportunity to raise timeliness issues with regard to remaining claimants, and the trial court will address any "stale" claims, should they exist. Presumably, this Court will provide guidance on the issue in its opinion in *National Railroad Passenger Corp. v. Morgan*.

CONCLUSION

This case is not the proper vehicle for the sweeping review of Rule 23 class action litigation urged by the petitioner. It is a fact driven case, still awaiting trial and final ruling. The opinion creates no conflicts, and this case's procedural posture is far from ripe. As such, the petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN M. KLAMANN
DIRK HUBBARD
KLAMANN & HUBBARD
7101 College Boulevard
Suite 120
Overland Park, KS 66210
(913)327-7600

BERT S. BRAUD*
DENNIS E. EGAN
THE POPHAM LAW FIRM, P.C.
323 West 8th Street
Suite 200
Kansas City, MO 64105
(816)221-2288

Attorneys for Respondent

* *Counsel of Record*

Supreme Court, U.S.
FILED
FEB 22 2002
CLERK

(3)

No. 01-881

IN THE

Supreme Court of the United States

GENERAL ELECTRIC CAPITAL CORP., d/b/a GE CAPITAL, MONTGOMERY WARD CREDIT SERVS., INC., f/k/a, MONOGRAM RETAILER CREDIT SERVICES, INC.,

Petitioners,

v.

GARY A. THIESSEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONERS

STEVEN T. CATLETT
JONES, DAY, REAVIS & POGUE
77 West Wacker Drive
Chicago, IL 60601
(312) 782-3939

GLEN D. NAGER
(Counsel of Record)
LAWRENCE D. ROSENBERG
DOMINICK V. FREDA
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

Counsel for Petitioners

14pp

TABLE OF AUTHORITIES

Page

Cases

Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998) 6, 7
Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996) 7
Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) 10
Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 5
Hipp v. Liberty National Life Insurance Co., 252 F.3d 1208 (11th Cir. 2001), *cert. denied*, 2002 WL232923 (Feb. 19, 2002) 10
Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165 (1989) 2
Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999 (11th Cir. 1997) 8
Kolstad v. American Dental Association, 527 U.S. 526 (1999) 6
Lorillard v. Pons, 434 U.S. 575 (1978) 6
Lusardi v. Xerox Corp., 118 F.R.D. 351 (D.N.J. 1987), *rev'd in part on other grounds*, 855 F.2d 1062 (3d Cir. 1988) 6
Mooney v. Aramco Services Co., 54 F.3d 1207 (5th Cir. 1995) 2, 4, 5
Murray v. Auslander, 244 F.3d 807 (11th Cir. 2001) 8
National Railroad Passenger Corp. v. Morgan, No. 00-1614 10
In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995) 3, 4
Robinson v. Metro-North Commuter Railroad, 267 F.3d 147 (2d Cir.), *pet. for cert. filed*, 70 U.S.L.W. 3429 (Dec. 17, 2001) (No. 01-908) 5, 7, 10

TABLE OF AUTHORITIES
(Continued)

Page

Rutstein v. Avis Rent-A-Car Systems., Inc., 211 F.3d 1228 (11th Cir. 2000), *cert. denied*, 121 S. Ct. 1354 (2001) 6, 7, 8
Smith v. Texaco, Inc., 263 F.3d 394 (5th Cir. 2001), *op. withdrawn*, 2002 WL 131415 (Feb. 1, 2002) 6, 7
Stastny v. Southern Bell Telephone & Telegraph Co., 628 F.2d 267 (4th Cir. 1980) 4
Szabo v. Bridgeport Machines., Inc., 249 F.3d 672 (7th Cir.), *cert. denied*, 122 S. Ct. 348 (2001) 3, 4
Teamsters v. United States, 431 U.S. 324 (1977) 1
TRW, Inc. v. Andrews, 123 S. Ct. 441 (2001) 9

Statutes & Rules

29 U.S.C. § 216(b) 2
Fed. R. Civ. P. 23 ..... 2, 5

Miscellaneous

Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* (7th ed. 1993) 1

REPLY BRIEF FOR PETITIONERS

As the petition demonstrated (Pet. 9-16), the decision below deepens a circuit split on the question whether a district court may make factual findings on class certification issues that overlap with the merits of the case. Petitioners further demonstrated (Pet. 16-24) that the decision below deepens a circuit split on the question whether a district court must use the multi-stage trial plan embraced in *Teamsters v. United States*, 431 U.S. 324 (1977), in deciding whether to certify a class seeking to litigate juriable claims for legal relief. Finally, petitioners showed (Pet. 25-30) that the decision below deepens circuit splits on three distinct questions concerning the "continuing violation" doctrine — (1) whether that doctrine can be applied to resurrect a single plaintiff's stale claims; (2) whether that doctrine can be applied to resurrect the stale claims of other putative plaintiffs; and (3) whether that doctrine applies to discrete employment actions, such as terminations. The *amici* filings of the U.S. Chamber of Commerce, the National Association of Manufacturers, and the Washington Legal Foundation confirm the importance of these issues and the need for this Court's prompt attention to them. Respondent's opposition is unfounded.

1. Respondent initially errs in suggesting (Opp. 1-2) that review by this Court is premature because "[n]o final ruling has been made" and "[t]he law and facts of this case are not fully developed . . . ." The district court here entered a final judgment disposing of the entire case, dismissing eight putative plaintiffs on timeliness grounds, decertifying the remainder of the putative class, and granting summary judgment against the principal plaintiff. Based upon the record that already exists, the court below then held that, in doing so, the district court had committed three distinct legal errors. The court below did not envision that further proceedings in this case would in any way affect these three legal rulings. This case thus fits squarely into the category of interlocutory judgments that this Court routinely reviews. *See* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* 196 (7th ed. 1993) ("where . . . there is some important and

clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status") (citing numerous cases).

2. Respondent next argues (Opp. 2-10) that this case does not properly present the question whether a district court may make factual findings on class certification issues that overlap with the merits. This argument is in error.

a. Contrary to respondent's suggestion, it does not matter that this case is technically subject to 29 U.S.C. § 216(b) rather than to Rule 23 of the Federal Rules of Civil Procedure. The decision below is not so limited. As the court below noted (Pet. App. 8a-10a), this Court and others routinely look to Rule 23 authorities in deciding questions under 29 U.S.C. § 216(b). *See, e.g., Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 171 (1989); *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213-15 (5th Cir. 1995). Moreover, in deciding this case, the court below expressly held that "there is little difference" between Section 216(b) and Rule 23 and that both provisions "allow for consideration of the same or similar factors, and generally provide a district court with discretion to deny certification for trial management reasons." Pet. App. 13a. Even more critically, in holding that the district court here erred in making "findings" on certification issues that overlap with the merits, the court below expressly relied on Rule 23 cases. Pet. App. 16a. Indeed, while respondent makes rhetorical use of the Section 216(b)/Rule 23 distinction, he nowhere suggests that this distinction makes any difference in the analysis. Accordingly, this case is an excellent vehicle for addressing the question whether a district court may properly make findings on class issues that overlap with the merits, as the court below effectively held that *neither* Section 216(b) nor Rule 23 allow a district court to do so.

b. Respondent further errs in suggesting (Opp. 3-4) that the question whether a district court may make findings on class issues that overlap with the merits is not presented,

because the district court's error here was in going further and deciding the ultimate question of discrimination itself. As the district court stated:

> Contrary to plaintiffs' position, the court is not resolving the underlying merits of plaintiffs' claims. In requiring evidence of a link between the policy and the challenged employment actions, the court does not determine whether plaintiffs may individually state a cause of action or whether plaintiffs may ultimately prevail on the merits. . . . The court is simply determining whether the requirements of § 216(b) have been satisfied where, as here, plaintiffs concede that the only possible common thread among the plaintiff group is the existence of the blocker policy and adverse job actions which plaintiffs attribute, without more, to the application of the policy.

Pet. App. 62a. In reversing the district court, the Tenth Circuit did not take issue with this statement or deny that the district court's finding concerned whether common claims were actually presented. Rather, the Tenth Circuit held that the district court could not make such commonality findings because they *also* "necessarily encompasse[d] factual issues relevant to" the merits. *See* Pet App. 15a-16a; *see also* Pet App. 10a-12a. Thus, the circuit conflict is squarely presented.

c. For similar reasons, respondent plainly errs in disputing (Opp. 4-6, 7-9) that the decision below is in conflict with the decisions of other courts. As noted in the petition (at 10-13), the Third, Fourth, Fifth and Seventh Circuits have held that a district court *must* make factual findings on all issues necessary for a proper class determination, even if those issues overlap with the merits.

Contrary to respondent's suggestion (Opp. 4-8), the decisions in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995), and *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir.), *cert. denied*, 122 S. Ct. 348 (2001), cannot be distinguished on the ground that the former involved "mass

tort" litigation and the latter involved "breach of warranty and fraud." Nor can they be distinguished by reference to the volume of the records in the respective cases, respondent's perception of the strength of his evidence of alleged discrimination, or the precise stage of the proceedings at which the class certification decision is made. These distinctions proffered by respondent are irrelevant to the core legal question whether a district court may make findings on class issues that overlap with the merits — and that is the question on which the Seventh Circuit and the court below directly conflict. *Compare Rhone Poulenc*, 51 F.3d at 1299-1300, and *Szabo*, 249 F.3d at 675-77, *with* Pet. App. 15a-16a.

Likewise, respondent's attempt (Opp. 8-9) to minimize the conflict between the decision below and *Stastny v. Southern Bell Telephone & Telegraph Co.*, 628 F.2d 267 (4th Cir. 1980), does not withstand analysis. Again, contrary to respondent's assertion, it is immaterial that the trial court in *Stastny* made its findings on class certification at trial. What matters is that the Fourth Circuit squarely held that because "the class action and merit inquiries essentially coincide," a "fair determination of the propriety of class action may be exceedingly difficult without conducting an inquiry roughly comparable to that required to resolve the 'pattern and practice' issue on the merits" (*id.* at 274), which is the very inquiry that the decision below bars as a matter of law. Indeed, respondent's concession (Opp. at 8) that "it was permissible for the Court [in *Stastny*] to make factual determinations concerning class requirements" is fatal to his defense of the decision below.

Respondent's argument (Opp. 9) that there is no conflict between the decision below and the Fifth Circuit's decision in *Mooney* is similarly mistaken. While the Fifth Circuit in *Mooney* did not endorse any specific criteria for the "similarly situated" inquiry, it sanctioned the substantial factfinding on certification issues in which the district court there engaged, even though those issues overlapped the merits of that ADEA

case. *See* 54 F.3d at 1214-16. *Mooney* and the decision below are thus irreconcilable.

d. Finally, respondent erroneously suggests (Opp. 9-10) that the question presented is not a "recurring problem" requiring this Court's prompt attention. Contrary to respondent's position, the issue is not precisely how many *employment* class actions are pending in the federal courts, but rather is how many class actions *of all subject matter* are pending. As respondent's own discussion indicates, there are thousands pending, and thousands more filed each year. Thus, as the *amici* filings confirm (WLF Br. 5, 17; Chamber Br. 4, 17), the question whether a district court may make factual findings on certification issues that overlap with the merits is profound — especially in light of the immense pressure for the defendant to settle once a class is certified, *see, e.g., Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). The importance of the issue is in fact confirmed by the pendency of another petition raising the same issue. *See Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 163-64 (2d Cir.), *pet. for cert. filed*, 70 U.S.L.W. 3429 (Dec. 17, 2001) (No. 01-908). This Court's immediate review is warranted.

3. Respondent next contends (Opp. 10-15) that this case is not a proper vehicle for resolving the split regarding whether a district court must use the multi-stage trial plan embraced in *Teamsters* in deciding whether to certify a class seeking legal relief on juriable claims. This contention also is in error.

a. Contrary to respondent's suggestion (Opp. 10), this case directly presents the circuit split posed by the petition. While the cases cited in the petition arose under various laws in Rule 23 cases, those cases did not turn on the nuances of the particular laws or on the fact that they were Rule 23 cases (as opposed to cases under other collective action rules). Rather, those cases turned on their determination that, in the context of juriable claims seeking legal relief, a district court is not required to apply, and may abuse its discretion if it applies, the *Teamsters* multi-stage trial plan in deciding whether to certify

a class. *See, e.g., Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1239 (11th Cir. 2000) (42 U.S.C. § 1981), *cert. denied*, 121 S. Ct. 1354 (2001); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 421-22 (5th Cir. 1998) (Title VII); *see also Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 373-80 (D.N.J. 1987) (ADEA), *rev'd in part on other grounds*, 855 F.2d 1062 (3d Cir. 1988). In contrast, although the district court here held (Pet. App. 121a, 124a) that application of the *Teamsters* multi-stage trial plan to juriable ADEA claims for legal relief would be unmanageable, prejudicial and subject to serious constitutional challenges, the Tenth Circuit held (Pet. App. 13a-18a) that application of the *Teamsters* multi-stage trial approach is mandatory. This holding presents a square conflict about the proper application of *Teamsters*. That these juriable claims for legal relief arose under the ADEA rather than Title VII (or Section 1981) was of no significance to the Tenth Circuit, and thus has no bearing on the appropriateness of certiorari review.

b. Respondent errs in suggesting (Opp. 10-12) that "this case is not a proper vehicle for resolving" the circuit split because, "[i]n this ADEA case, compensatory damages are unavailable." This misstates the circuit split. The issue is not whether the *Teamsters* multi-stage trial plan is mandatory in cases involving compensatory damages. Rather, as the petition explains (Pet. 16-20), the circuit split is about whether the *Teamsters* multi-stage trial plan is mandatory in cases involving *juriable* claims for *legal* relief. This Court has held that ADEA claims for back pay and liquidated damages are juriable claims for legal relief. *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 578-84 (1978); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 537 (1999) (applying ADEA liquidated damages standard to punitive damages under Title VII). Thus, this case squarely joins issue on the question dividing the circuits.

c. Respondent further errs in arguing (Opp. 11) that the Fifth Circuit's withdrawal of its opinion in *Smith v. Texaco,*

Inc., 263 F.3d 394 (5th Cir. 2001), *op. withdrawn*, 2002 WL 131415 (Feb. 1, 2002), diminishes the degree of judicial conflict over the question presented. *Smith* was withdrawn only because the parties settled. *See* 2002 WL 131415, at *1. Moreover, *Smith* itself merely restated prior Fifth Circuit precedent that continues to conflict with the Tenth Circuit's decision below. For example, in holding (263 F.3d at 409-10) that "applying *Teamsters* to require certification was improper, since the case 'as a whole' must satisfy the certification requirements," *Smith* was relying upon *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996). Likewise, *Smith* looked to *Allison*, 151 F.3d at 419-20, in holding that the need for "individualized proof" counseled strongly against certification. 263 F.3d at 410, 413. And, *Allison*, in turn, relied upon *Castano* for the proposition — recounted in *Smith*, 263 F.3d at 410 — that, "[u]nder such circumstances, an action conducted nominally as a class action would 'degenerate in practice into multiple lawsuits separately tried.'" 151 F.3d at 419 (quoting *Castano*, 84 F.3d at 745 n.19). In fact, the Second Circuit, which agrees with the Tenth Circuit's position on this point (Pet. 17-18), recognized *Smith* as a mere restatement of existing Fifth Circuit law in declining to follow both *Smith* and *Allison*. *See Robinson*, 267 F.3d at 163-64.

d. Respondent similarly errs (Opp. 11-12) in his misguided effort to distinguish *Rutstein*. While *Rutstein* noted that *Teamsters* is applied primarily in employment discrimination cases, it held that *Teamsters* was inapplicable where juriable claims for legal relief are involved, because, "*more important[ly]*, the relief to which individual plaintiffs were entitled after a finding of a pattern or practice of discrimination in *Teamsters* (and in all subsequent cases employing the *Teamsters* rationale) was *equitable* in nature." *Id.* at 1239 (emphasis added). The *Rutstein* court noted that "[t]he *Teamsters* framework is, therefore, inappropriate" where "establishment of a policy or practice of discrimination cannot trigger the defendant's liability for damages to all the

plaintiffs in the putative class. . . . The idea that individual injury could be settled on a class-wide basis is preposterous." *Id.* *Rutstein*'s conflict with the decision below is stark. *See also Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001) ("[A]ssessing damages for these inherently individual injuries compels an inquiry into each class member's individual circumstances."); *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1006 (11th Cir. 1997) ("plaintiffs' claims will require distinctly case-specific inquiries into the facts surrounding each alleged incident of discrimination").

e. Respondent erroneously contends (Opp. 1-2, 13-15) that this case is a poor vehicle for addressing the *Teamsters* issue because only 28 plaintiffs are involved. But the district court here found that, because of the widely-varying circumstances of the plaintiffs, "this case may be in danger of passing" the "realistic limit on what a jury may reasonably be expected to absorb, retain, and process," and that, in these circumstances, a *Teamsters* bifurcation "would be unduly prejudicial to the defendants" and "would be subject to serious constitutional challenges." Pet. App. 121a, 124a; *see also* Pet. App. 75a-76a. Thus, while respondent may not believe that 28 plaintiffs can create case management and/or constitutional problems, the district court here found to the contrary. In light of the district court's findings on these critical issues, the case presents an ideal vehicle for deciding whether the *Teamsters* multi-stage trial plan is mandatory where juriable claims for legal relief are involved.

f. Finally, respondent does not contest the importance of the *Teamsters* issue. Nor could he. As *amici* filings by the Chamber of Commerce, National Association of Manufacturers, and Washington Legal Foundation make clear, the *Teamsters* issue has great importance and arises with great frequency. *See* WLF Br. 16-17; Chamber Br. 4, 10. It is an issue with which lower courts have struggled, in large part because this Court has never considered *Teamster*'s applicability to juriable claims for legal relief. Accordingly,

there is little prospect of the circuit split resolving without guidance from this Court. Particularly given the constitutional dimension of the issue, that guidance should be provided immediately.

4. Respondent never seriously disputes any of the three circuit splits or the recurrence and importance of the issues surrounding the Tenth Circuit's application and extension of the "continuing violation" doctrine. Indeed, respondent never even mentions the third timeliness conflict regarding application of the "continuing violation" doctrine to instances of discrete adverse employment actions, such as terminations or failures to promote. Respondent instead opposes certiorari almost entirely on case-specific grounds that are meritless.

a. Respondent first suggests (Opp. 15-16) that the timeliness issues raised by the petition are not ripe for review because, in remanding to the district court, the Tenth Circuit held that claims arising more than 300 days prior to the filing of respondent's EEOC charge will be untimely if plaintiffs cannot establish that the alleged pattern or practice of discrimination continued into the charge-filing period. Pet. App. 19a-20a & n.9, 21a-24a. But the question whether *any* pre-charge-filing claims of respondent may be the basis for recovery, even if the alleged pattern or practice continued into the charge-filing period, is plainly ripe for review. Likewise, whether the claims of the eight opt-in plaintiffs which arose entirely outside of the charge-filing period may be the basis for recovery is also a question plainly ripe for review. Those claims were held untimely by the district court; and the Tenth Circuit's use of the "continuing violation" doctrine to revive them conflicts with the decisions of other courts. That the claims may yet fail on *other* grounds does not lessen the judicial conflict or alter the significance of the Tenth Circuit's ruling on this particular ground. As this Court has recognized numerous times, that potentially dispositive questions will remain after this Court's decision is a reason for remanding after reversal, not for denying certiorari. *See, e.g., TRW, Inc.*

v. Andrews, 123 S. Ct. 441, 451 (2001); *Cooper Indus. Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431 (2001).

b. Respondent likewise errs in his effort (Opp. 16-18) to distance this case from *National Railroad Passenger Corp. v. Morgan*, No. 00-1614. To the extent that respondent argues that *Morgan* concerns only the application of the "continuing violation" doctrine where an individual is subject to alleged "serial" violations, he in fact confirms that this case presents a distinct question meriting this Court's review — namely, whether the "continuing violation" doctrine may be used to revive the otherwise stale claims of class members who, as alleged here, are victims of a "pattern or practice" of discrimination. Moreover, to the extent that respondent argues that *Morgan* will itself potentially address or resolve all of the three legal questions raised by the Tenth Circuit's application of the "continuing violation" doctrine, the appropriate and standard course of action is to hold the petition until *Morgan* has been decided. The case should not be sent back to the district court until the many circuit conflicts raised by the decision below have been resolved.

c. Finally, respondent errs in suggesting (Opp. 17) that the decision below is not in conflict with *Hipp v. Liberty National Life Insurance Co.*, 252 F.3d 1208 (11th Cir. 2001), *cert. denied*, 2002 WL 232923 (Feb. 19, 2002). *Hipp* holds that a plaintiff *cannot* "revive a stale claim simply because the allegedly discriminatory policy still exists and is being enforced against others." *Id.* at 1221. That holding conflicts with the decision below and, as explained in the petition (at 27-28), presents a question requiring prompt review by this Court. Because *Morgan* does not appear to present this recurring question, the Court should grant this petition to resolve the circuit conflict.

CONCLUSION

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

STEVEN T. CATLETT
JONES, DAY, REAVIS & POGUE
77 West Wacker Drive
Chicago, IL 60601
(312) 782-3939

GLEN D. NAGER
(Counsel of Record)
LAWRENCE D. ROSENBERG
DOMINICK V. FREDA
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939
Counsel for Petitioners

MOTION FILED
FEB 12 2002

(4)

No. 01-881

IN THE
Supreme Court of the United States

GENERAL ELECTRIC CAPITAL CORP., d/b/a GE CAPITAL; MONTGOMERY WARD CREDIT SERVS., INC., f/k/a MONOGRAM RETAILER CREDIT SERVICES, INC.,
Petitioners,

v.

GARY A. THIESSEN,
Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: February 12, 2002

29pp

Of Counsel:

Jan S. Amundson
General Counsel
Quentin Riegel
Deputy General Counsel
National Association of Manufacturers
1331 Pennsylvania Avenue, NW
Washington, DC 20004-1790
(202) 637-3000

IN THE
SUPREME COURT OF THE UNITED STATES

No. 00-881

GENERAL ELECTRIC CAPITAL CORP., d/b/a GE CAPITAL; MONTGOMERY WARD CREDIT SERVS., INC., f/k/a MONOGRAM RETAILER CREDIT SERVICES, INC.,
Petitioners,

v.

GARY A. THIESSEN,
Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Tenth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF OF WASHINGTON LEGAL FOUNDATION AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) and the National Association of Manufacturers (NAM) respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioners. Petitioners have consented to the filing of this brief; their letter of consent has been lodged with the Clerk of the Court. WLF and NAM have been unable to obtain the

consent of Counsel for Respondent, thereby necessitating the filing of this motion.

WLF is a non-profit public interest law and policy center with supporters in all 50 states. While WLF engages in litigation and participates in administrative proceedings in a variety of areas, WLF devotes a substantial portion of its resources to advancing the interests of the free-enterprise system and to ensuring that economic development is not impeded by excessive litigation. To that end, WLF has appeared before this Court as well as other federal and State courts in cases touching upon the proper scope of class action litigation. *See, e.g., Matsushita Electric Industrial Co. v. Epstein,* 516 U.S. 367 (1996); *Linder v. Thrifty Oil Co.,* 23 Cal.4th 429 (2000); *Diamond Multimedia Systems v. Superior Ct.,* 19 Cal.4th 1036 (1999), *cert. denied,* 527 U.S. 1003 (2000).

NAM is the nation's largest industrial trade association; it represents 14,000 member companies and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states. NAM has actively supported adoption of class action reform by Congress.

WLF and NAM are concerned by the proliferation of class action lawsuits being filed in federal and state courts and the inhibiting effect that such suits can have on the development and expansion of businesses. WLF and NAM believe that the class-certification decision of the Tenth Circuit in this case, if allowed to stand, will exacerbate that trend by encouraging efforts to certify inappropriate, unwieldy classes that render the underlying lawsuits untriable.

WLF and NAM are filing this brief because of their interest in promoting the welfare of the business community and the public at large; they have no direct interest in the outcome of this lawsuit. Because of their lack of direct economic interests, WLF and NAM believe that they can assist the Court by providing a perspective that is distinct from that of any party.

For the foregoing reasons, the Washington Legal Foundation and the National Association of Manufacturers respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

Of Counsel:

Jan S. Amundson
General Counsel
Quentin Riegel
Deputy Gen'l Counsel
National Association of Manufacturers
1331 Pennsylvania Ave., NW
Washington, DC 20002-1790
(202) 637-3000

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: February 12, 2002

QUESTIONS PRESENTED

Amici curiae address the following issues only:

1. Whether, in determining if a case may proceed as a class or collective action, a district court is prohibited from making factual findings on certification issues that overlap with merits issues?

2. Whether, in a private suit seeking damages from a jury for an alleged pattern-or-practice of discrimination, a district court must use the multi-stage trial plan embraced in *Teamsters v. United States*, 431 U.S. 324 (1977), in deciding whether to certify a class?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTERESTS OF THE *AMICI CURIAE* 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION 5

I. A COURT CANNOT ADEQUATELY DETERMINE WHETHER CLASS MEMBERS ARE "SIMILARLY SITUATED" UNLESS IT EXAMINES FACTUAL ISSUES THAT, TO SOME EXTENT, OVERLAP MERITS ISSUES . . 7

II. THE MULTI-STAGE TRIAL PLAN EMBRACED IN *TEAMSTERS* IS NOT WELL-ADAPTED TO SOLVING "PREDOMINANCE" AND "SUPERIORITY" PROBLEMS INHERENT IN ANY PATTERN-OR-PRACTICE CASE IN WHICH THE PLAINTIFFS SEEK DAMAGES FROM A JURY 15

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases:

Abdallah v. Coca-Cola Co.,
133 F. Supp. 2d 1364 (N.D.Ga. 2001) 17
Amchem Products, Inc. v. Windsor,
521 U.S. (1997) 6, 18
Castano v. American Tobacco Co.,
84 F.3d 734 (5th Cir. 1996) 5, 13
Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) 10
Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974) 10
McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 12
Mace v. Van Ru Credit Corp.,
109 F.3d 338 (7th Cir. 1997) 6
Matter of Rhone-Poulenc Rohrer, Inc.,
51 F.3d 1293 (7th Cir.),
cert. denied, 516 U.S. 1984 (1995) 5
St. Mary's Honor Center v. Hicks,
509 U.S. 502 (1993) 12
Smith v. Texaco, Inc.,
263 F.3d 394 (5th Cir. 2001) 17, 19
Southwestern Refining Co. v. Bernal,
22 S.W.3d 425 (Tex. 2000) 18
Teamsters v. United States,
431 U.S. 324 (1977) . . . . . *passim*

Statutes and Rules:

Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* 1, 7, 8, 16
29 U.S.C. § 626(b) 2, 7

Civil Rights Act of 1974, Title VII 15

Civil Rights Act of 1991 . . . . . 15, 16

Fair Labor Standards Act ("FLSA") § 16(b), 29 U.S.C. § 216(b) 7, 8

42 U.S.C. § 1981a(b) 15
42 U.S.C. § 1981a(c) 15

Fed.R.Civ.P. 23 . . . . . 3, 7, 8, 10, 16

Miscellaneous:

B. McGuire, *Death Knell for Eisen: Why the Class Action Analysis Should Include an Assessment of the Merits,* 168 F.R.D. 366 (1996) 11

Charles S. Mishkind and V. Scott Kneese, *Big Risks and Opportunities, Class Actions and Pattern and Practice Cases,* 662 PLI/Lit 403 (2001) 17

D. Towns, Note, *Merit-Based Class Action Certification: Old Wine in New Bottles,* 78 Va. L. Rev. 1001 (1992) 14

Wright, Miller & Cooper, *Federal Practice and Procedure* (1976) 11

BRIEF OF WASHINGTON LEGAL FOUNDATION AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE*

The interests of *amici curiae* Washington Legal Foundation (WLF) and National Association of Manufacturers (NAM) are set forth in the motion accompanying this brief.[1]

STATEMENT OF THE CASE

In the interests of brevity, *amici* hereby incorporate by reference the Statement contained in the Petition for a Writ of Certiorari.

In brief, Petitioners General Electric Capital Corporation ("GE") and Montgomery Ward Credit Services, Inc. seek review of a decision of the U.S. Court of Appeals for the Tenth Circuit that reversed a district court's decision to decertify a putative class action filed by Respondent Gary A. Thiessen. Thiessen alleges that he and similarly situated employees were adversely affected by a pattern or practice of age discrimination employed by GE, in violation of the Age Discrimination in Employment Act (ADEA).

Thiessen was hired in 1968 by Monogram Retail Credit Services, Inc. ("MRCSI," subsequently renamed Mont-

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

gomery Ward Credit Services, Inc.). He held various management positions at MRCSI until 1994, when he was given a series of "special assignments." In February 1996, Thiessen filed charges with the Kansas Human Rights Commission and the Equal Employment Opportunity Commission ("EEOC"), alleging that he had been the victim of age discrimination. He alleged that GE and MRCSI had adopted a "blocker policy," whereby GE and MRCSI sought to eliminate competent, older management employees who were thought to be "blocking" the advancement of younger, more promising employees. Thiessen alleged that he had been denied advancement as a result of the alleged "blocker policy."

In September 1996, Thiessen filed suit under the ADEA in federal district court in Kansas, raising the claims set forth in his EEOC charge. Alleging that "similarly situated" employees had also been injured under Petitioners' pattern or practice of age discrimination, Thiessen requested that the suit be granted "opt-in" class action status, pursuant to 29 U.S.C. § 626(b). In February 1998, the district court provisionally certified the case as a collective action under the ADEA and allowed 22 other GE/MRCSI employees (out of 30 who responded to Thiessen's notice of the action) to opt in. Petition Appendix ("Pet. App.") 98a-125a.

At the conclusion of discovery, Petitioners moved to decertify the class and also moved for summary judgment as to each of the 23 plaintiffs. The district court granted the motion to decertify and granted summary judgment as to Thiessen's individual claims. Pet. App. 52a-97a. The court concluded that the plaintiffs were not "similarly situated for purposes of proceeding as a collective action" because they

had failed to present evidence of a causal link between the alleged "blocker policy" and the challenged employment actions. *Id.* at 70a. The court also determined that "individual issues would predominate at trial," *id.* at 70a-74a; that trial of the claims on a class-wide basis would be unmanageable in light of the heavy demands it would place on the single jury deciding all factual issues, *id.* at 74a-76a; and that individualized consideration of the plaintiffs' claims would be "impossible." *Id.* at 76a. The court also granted summary judgment to Petitioners on Thiessen's individual claims, finding that three of Thiessen's claims were time-barred and that he had failed to introduce sufficient evidence to create an inference that Petitioners' proffered explanation for their actions was pretextual. *Id.* at 76a-96a.

The Tenth Circuit reversed, finding that the district court had erred both in decertifying the class and in granting summary judgment to Petitioners with respect to Thiessen's individual age discrimination claims. *Id.* at 1a-26a. Applying precedent involving class actions filed under Fed.R.Civ.P. 23, the Tenth Circuit held that the district court, in determining that the plaintiffs were not "similarly situated," improperly focused on the "merits of the underlying class action." *Id.* at 16a. The appeals court held that the district court -- by determining that there was no causal link between the alleged "blocker policy" and the challenged employment actions, and thus that the plaintiffs could not be deemed "similarly situated" -- "deprived plaintiffs of their right to have the issues decided by a jury, or at least have the court determine, under summary judgment standards, whether there was sufficient evidence to send to the jury." *Id.* The court held that the plaintiffs' evidence regarding the alleged "blocker policy" was

sufficient to demonstrate that they were "similarly situated" and thus that decertification of the class was an abuse of discretion. *Id.* at 17a-18a.

The appeals court disagreed with the district court's concerns that individual issues would predominate at trial, rendering the case unmanageable. The court said that the district court's analysis was affected by "its failure to recognize that plaintiffs were proceeding under a pattern-or-practice theory." *Id.* at 16a. Relying on this Court's endorsement of multi-stage trial plans in pattern-or-practice cases in *Teamsters v. United States,* 431 U.S. 324 (1977), the appeals court held that the individualized facts relevant to each of the plaintiffs' claims "would not become the focal point until the second stage of trial and could be dealt with in a series of individual trials, if necessary." *Id.* The court did not address the district court's assertion that, even under a *Teamsters* multi-stage approach, a single jury would be required to make all factual findings with respect to all plaintiffs.

The appeals court also reversed the grant of Petitioners' motion for summary judgment as to Thiessen's individual claims. The court held that it is improper for a district court to consider summary judgment motions regarding stage-two *Teamsters* issues (*i.e.,* whether an individual plaintiff was injured by an alleged pattern or practice of discrimination) before the court has resolved whether such a pattern or practice actually existed. *Id.* at 20a.

REASONS FOR GRANTING THE PETITION

This case raises a number of issues of exceptional importance that warrant review by the Court. The Petition amply demonstrates that the decision below raises issues of national concern that recur frequently and that have deeply divided the federal appeals courts.

Underlying each of the issues raised by the Petition are the distortions being imposed on the litigation process by the ever-increasing number of class actions being certified by federal and state courts, in the employment discrimination litigation context and in other areas of the law as well. As numerous commentators have recognized, defendants that face a large certified class and hence enormous potential damages are "under intense pressure to settle." *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (Posner, C.J.), *cert. denied,* 516 U.S. 1984 (1995). If not wanting to "roll the dice," they settle, often without regard to the merits of the plaintiffs' claims. *Id. See also Castano v. American Tobacco Co.* 84 F.3d 734, 746 (5th Cir. 1996) (pressure emanating from certification of big classes amounts to "judicial blackmail," creating "insurmountable pressure on defendants to settle"; "[t]he risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low").

Class actions do, of course, serve laudable goals, and the distortions discussed above can be an acceptable price to pay for achieving those goals. For example, class actions can promote judicial economy by reducing the number of occasions on which courts will be required to consider the legal consequences of a recurring fact pattern. Moreover:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for an individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.,* 109 F.3d 338, 344 (7th Cir. 1997)).

But when a putative class action is unlikely to result in significant saving of judicial resources or to provide incentives for those with small claims to vindicate rights they might otherwise abandon, there can be little justification for coercing defendants into settling marginal claims by certifying the class action. The ruling below, if allowed to stand, is likely to result in a significant increase in the number of certified class actions that do not serve any of the purposes for which class actions were created. Review should be granted both to resolve the conflicts between the ruling below and other federal appeals courts rulings, and to correct significant errors by the Tenth Circuit that threaten to undermine the salutary purposes of class and collective action devices.

ARGUMENT

I. A COURT CANNOT ADEQUATELY DETERMINE WHETHER CLASS MEMBERS ARE "SIMILARLY SITUATED" UNLESS IT EXAMINES FACTUAL ISSUES THAT, TO SOME EXTENT, OVERLAP MERITS ISSUES

The ADEA permits an age discrimination suit to proceed as a class action when other employees who wish to opt into the case are "similarly situated" to the plaintiff. Fair Labor Standards Act ("FLSA") § 16(b), 29 U.S.C. § 216(b).[2] Thus, any court asked to certify an ADEA suit as a collective action must examine closely whether the plaintiff is "similarly situated" to those seeking to opt into the suit. Although a collective action under the ADEA is not technically a "class action" covered by Fed.R.Civ.P. 23, most differences between ADEA collective actions and Rule 23 class actions are not substantial,[3] and most courts -- including the court

---

[2] 29 U.S.C. § 216(b) provides, in relevant part:

> An action to recover [appropriate legal or equitable relief, including liquidated damages] may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves *and other employees similarly situated.* (Emphasis added.)

Section 216(b) is incorporated into the ADEA by 29 U.S.C. § 626(b).

[3] The principal difference is that similarly situated employees may be joined as parties to an ADEA or FLSA collective action only if they take affirmative steps to join. *See* 29 U.S.C. § 216(b) ("No employee (continued...)

below -- routinely look to Rule 23 case law in determining whether an ADEA or FLSA action meets the "similarly situated" criterion for certification as a collective action.

The district judge initially certified this case as a collective action. However, upon the completion of discovery, he examined the issue a second time in response to Petitioners' motion to decertify the class. He determined:

> [P]laintiffs have failed to come forward with sufficient evidence of a causal link between the blocker policy or plaintiffs' purported blocker status and the challenged employment actions. Without such evidence, the court simply cannot conclude that the plaintiffs are similarly situated for purposes of proceeding as a collective action when, by their own admission, the blocker policy is the only possible connection among the plaintiff group. As such, the court grants defendants' motion to decertify and dismisses the claims of the opt-in plaintiffs.

Pet. App. 70a.

On appeal, the Tenth Circuit did not dispute the district court's finding that plaintiffs had presented insufficient evidence of a link between the blocker policy and the challenged employment actions. Rather, the appeals court

---

[3](...continued)
shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."). Rule 23 permits certification of a class without the assent of absent class members.

reversed the decertification order on the ground that the district court had erred by focusing on factual issues that overlapped with merits issues. Pet. App. 16a. The appeals court held that such factual issues should not be decided in connection with certification motions but rather should be decided by the jury at trial. *Id.*

Petitioners have demonstrated convincingly that the decision below conflicts sharply with other federal appeals court decisions that have encouraged district courts to make findings on class certification issues that overlap with the merits. That conflict is reason enough to grant the Petition.

Moreover, there is little to recommend the rule adopted by the Tenth Circuit. That rule effectively requires certification of *all* pattern-or-practice discrimination claims that are supported by *some* "legitimate evidence,"[4] regardless of whether that evidence would be sufficient to withstand a motion for summary judgment and regardless of whether any of the plaintiffs was actually affected by the alleged pattern or practice. But if none of the plaintiffs was affected by the alleged pattern or practice, it is difficult to comprehend how the plaintiffs could be said to be "similarly situated." Before a district court determines that the plaintiffs *are* "similarly situated," it ought to be permitted to examine all relevant evidence, including any evidence from the defendant that the

---

[4] Pet. App. 18a. The appeals court did not attempt to explain how much evidence constitutes "legitimate evidence," nor did it attempt to explain when denial of class certification would ever be permissible (at least with respect to the first phase of proceedings) once "legitimate evidence" to support a pattern or practice allegation has been introduced.

challenged employment actions were unrelated to the alleged pattern or practice.

True, such an examination will require the court to make findings that overlap with merits issues. But while this Court has cautioned against denial of class certification on the grounds that the plaintiff's case is weak on the merits,[5] the Court has never suggested that a trial court should avoid making factual findings on issues relevant to the propriety of class certification simply because those findings would also be relevant at trial to merits issues. Indeed, the Court has repeatedly indicated that the opposite is true. For example, in a decision handed down only four years after *Eisen*, the Court stated:

> Evaluation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims. The typicality of the representative's claims or defenses, the adequacy of the representative, and the presence of common questions of law or fact are obvious examples. The more complex determinations required in Rule 23(b)(3) class actions entail even greater entanglement with the merits.

Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 n.12 (1978) (quoting 15 Wright, Miller & Cooper, *Federal*

---

[5] *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177 (1974) ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.").

Practice and Procedure, § 3911 n.45 (1976)). The federal courts "have found opportunities, with increasing frequency, to invoke the merits in support of determinations that class action treatment" is either appropriate or inappropriate. B. McGuire, *Death Knell for Eisen: Why the Class Action Analysis Should Include an Assessment of the Merits,* 168 F.R.D. 366, 383 (1996).

The Tenth Circuit complained that by making factual findings that overlap with merits issues,"the district court essentially deprived plaintiffs of their right to have the issues decided by a jury, or at least have the court determine, under summary judgment standards, whether there was sufficient evidence to send the issue to the jury." Pet. App. 16a. That argument is without merit. There is no Seventh Amendment right to certification of one's class claims; if a district court determines that others with potential claims are not "similarly situated" to the plaintiff, then the plaintiff has no basis for complaining that his class claims were not presented to a jury. Moreover, if certification is denied, each potential class member is nonetheless free to file an individual suit and seek a trial by jury.

Equally implausible is the Tenth Circuit's argument that the district court erred because it "effectively deprived plaintiffs of th[e] procedural advantage" afforded plaintiffs who demonstrate that the defendant has engaged in a pattern or practice of discrimination against a protected group. *Id.*[6]

---

[6] Such plaintiffs are entitled to a rebuttable presumption that any adverse employment action suffered by members of the protected class was the product of the pattern or practice. *Teamsters v. United States,*

(continued...)

That argument misperceives the nature of the presumption in pattern-or-practice cases. Several avenues are available to a plaintiff who seeks to prove that he has been the victim of intentional discrimination. Plaintiffs frequently resort to the method outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under *McDonnell Douglas*, a plaintiff establishes a *prima facie* case of discriminatory employment treatment by demonstrating that: (1) he is a member of a protected class; (2) he is qualified for the job sought or hoped to be retained; (3) despite his qualifications, he was rejected (or discharged); and (4) after his rejection (or discharge), the position remained open and the employer continued to seek applications from persons of the plaintiff's qualifications. *Id.* at 802; *see also, St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 506 (1993).

Teamsters simply represents another method by which a plaintiff can create an inference of discriminatory treatment. Under *Teamsters*, a plaintiff creates such an inference by demonstrating that: (1) the employer has a pattern or practice of discriminating against the group of which the plaintiff is a member; (2) he has suffered an adverse employment decision. *Teamsters,* 431 U.S. at 358-62. Such an inference is created even in the absence of direct evidence that the plaintiff was the victim of discriminatory treatment, because (*Teamsters* explained) it is reasonable to infer that an employer with a pattern or practice of discrimination has acted in accordance with that pattern or practice in connection with any single employment action. *Id.* at 362. Nothing in *Teamsters* suggests that the pattern-or-

---

[6](...continued)
431 U.S. 324 362 (1977).

practice method of proof is limited to class actions or collective actions; to the contrary, *Teamsters* itself was not a class action, but rather was a suit brought by the United States against an employer and a union alleged to have engaged in racial discrimination. Thus, while the district judge ruled that Thiessen's claims could not proceed as a collective action, he never indicated that that ruling by itself barred Thiessen from proceeding under a pattern-or-practice method of proof.

The Tenth Circuit's statement that the district court's decertification order "deprived plaintiffs of this procedural advantage" is thus a misinterpretation of what was intended by *Teamsters*. The only "procedural advantage" that Thiessen lost by virtue of the decertification order was the advantage that comes to any plaintiff in a certified class action: the "insurmountable pressure on defendants to settle" certified class actions without regard to the merits of the case. *Castano*, 84 F.3d at 746. *Teamsters* did not intend to confer a procedural advantage of that sort.

The mischief caused by the Tenth Circuit's misinterpretation of *Teamsters* is compounded by the manner in which it disposed of Petitioners' motion for summary judgment on Thiessen's individual claims. The Tenth Circuit reversed the district court's grant of the motion, holding that it is improper to consider summary judgment motions regarding stage-two *Teamsters* issues (*i.e.*, whether an individual plaintiff was injured by an alleged pattern or practice of discrimination) before the court has resolved whether such a pattern or practice actually existed. *Id.* at 20a. That ruling virtually guarantees that the employer will be held hostage to a class certification order and will be forced into a settlement.

Under the Tenth Circuit's ruling, virtually every pattern-or-practice claim will be certified as a class or collective action and permitted to proceed to trial, even when the employer can demonstrate that the initial plaintiff's claim is frivolous (and thus subject to dismissal by means of a summary judgment motion) or wholly unrelated to the alleged pattern or practice. One leading commentator has noted that the tactical advantage gained by plaintiffs from class certification is to a large degree a product of the delays required before a defendant's summary judgment motion will be heard:

> There is an exploitable delay between the certification and summary judgment motions. The class certification increases the defendants' potential liability, leaving them vulnerable to strategic leveraging. The additional time and expense required gives plaintiffs unfair bargaining power in settling meritless claims. This is precisely what a merit-based certification procedure is designed to prevent. Even a small delay can drastically alter the settlement strategy of both parties and pervert the goals of Rule 23. Thus, the use of summary judgment motions in these circumstances will not prevent strategic harms. Allowing the judge to consider the underlying merits of the claim when deciding the certification issue would solve this dilemma.

D. Towns, Note, *Merit-Based Class Action Certification: Old Wine in New Bottles,* 78 Va. L. Rev. 1001, 1031 (1992).

By barring consideration of stage-two *Teamsters* summary judgment motions until after final resolution of stage-one issues, the Tenth Circuit has significantly increased the distortions already present in certified class actions. Such

distortions could be significantly reduced if district courts were permitted, in connection with class certification rulings, to make factual findings on issues that overlap with merits issues.

Review is warranted in this case to consider the Tenth Circuit's ruling -- contrary to rulings from the Fourth, Fifth, and Seventh Circuits -- that in determining whether a case may proceed as a class or collective action, a district court is prohibited from making factual findings on certification issues that overlap with merits issues.

II. THE MULTI-STAGE TRIAL PLAN EMBRACED IN *TEAMSTERS* IS NOT WELL-ADAPTED TO SOLVING "PREDOMINANCE" AND "SUPERIORITY" PROBLEMS INHERENT IN ANY PATTERN-OR-PRACTICE CASE IN WHICH THE PLAINTIFFS SEEK DAMAGES FROM A JURY

Teamsters was decided in an era in which the remedies available to plaintiffs in employment discrimination cases, including pattern-or-practice cases, were largely equitable in nature and the factfinder at trial was generally a judge rather than a jury. More recent federal legislation, particularly the Civil Rights Act of 1991, has altered the landscape considerably. For example, plaintiffs prevailing in Title VII employment discrimination claims are now entitled to seek compensatory and punitive damages. *See* 42 U.S.C. § 1981a(b). In all cases in which such damages are sought, either party may demand a jury trial. 42 U.S.C. § 1981a(c).

Those changes have enormous implications for the feasibility of maintaining pattern-or-practice employment

discrimination claims as class or collective actions. Damage claims are inherently individual in nature; any individual plaintiff's claim for damages is likely to depend far more heavily on issues unique to that plaintiff than on issues common to an entire class. Accordingly, serious questions arise, in any employment discrimination case in which the plaintiff(s) seek damages, whether: (1) the questions of law or fact common to members of the class "predominate" over any questions affecting only individual members; and (2) a class action is "superior" to other available methods for the fair and efficient adjudication of the controversy. If the plaintiff(s) cannot demonstrate predominance and superiority, class action treatment is generally inappropriate in a pattern-or-practice case in which damages are sought, regardless whether the plaintiff is proceeding under Rule 23(b)(3) or under the collective action provision of the ADEA.

As Petitioners have noted, the federal appeals courts have reached starkly conflicting results regarding the effect of damage claims on the feasibility of maintaining pattern-or-practice cases as class or collective actions. The decision below conflicts directly on this issue with decisions from the Fifth and Eleventh Circuits. Review is warranted in order to resolve that conflict.

Amici write separately in order to emphasize the tremendous difficulties being confronted by the business community due to class certification of pattern-or-practice employment discrimination cases in which damage awards are sought. The increased availability of damage awards in such cases has led to a sharp upsurge in class action filings. Class action filings in the federal courts have "dramatically increased" from approximately 30 per year in the decade

preceding adoption of the Civil Rights Act of 1991 to over 125 per year, and the number continues to rise. Charles S. Mishkind and V. Scott Kneese, *Big Risks and Opportunities, Class Actions and Pattern and Practice Cases,* 662 PLI/Lit 403, 414 (2001). The potential damage awards in such cases routinely run into the billions of dollars. For all the reasons discussed above, it is small wonder that once a class action is certified or likely to be certified in such cases, the employer virtually always enters into a settlement agreement -- often agreeing to pay sizeable damage awards to the plaintiff class. *See, e.g. Abdallah v. Coca-Cola Co.,* 133 F. Supp. 2d 1364 (N.D.Ga. 2001) (settling pattern-or-practice race discrimination claims for $192 million).

While acknowledging that the presence of claims for damages can add considerable complications to pattern-or-practice class actions, the Tenth Circuit insisted that the *Teamsters* multi-stage trial plan permits courts to certify a class while avoiding predominance and superiority problems. The appeals court said that even if each plaintiff's individual claims had to be tried separately during stage two of a case conducted pursuant to a *Teamsters* trial plan, common issues of fact and law would still predominate during stage one, during which the court would determine whether Petitioners maintained a broadscale pattern or practice of age discrimination. Pet. App. 16a-17a.

The Tenth Circuit's approach is seriously flawed. As other courts have held, it makes little sense to certify a class action unless the court determines that the predominance and superiority requirements are met for the case "as a whole," not simply during a single stage of the case. *See, e.g., Smith v. Texaco, Inc.,* 263 F.3d 394, 409 (5th Cir. 2001). Class

actions are designed to promote judicial economy.[7] If trying all phases of a class action would consume more resources than trying the claims of each plaintiff separately, it makes little sense to certify a class action simply because doing so will save resources at an initial stage of the case. The Texas Supreme Court has rightly derided the rationale underlying such class certification decisions, stating, "We reject this approach of certify now and worry later." *Southwestern Refining Co. v. Bernal,* 22 S.W.3d 425, 435 (Tex. 2000). Plaintiffs, of course, are generally quite happy with that approach; they rightly anticipate that certification will force defendants into settlement mode long before unwieldy portions of a class action come to trial. But courts should not embrace certification as an alleged resource-saving device based solely on the hope that it will coerce more settlements.

Moreover, as Petitioners correctly point out, the Seventh Amendment requires that a single jury decide all issues of fact in a class action. If, as the Tenth Circuit suggested, the individual claims of each plaintiff could well end up being adjudicated "in a series of individual trials" (Pet. App. 16a), then a single jury would need to be empaneled for an inordinate length of time. Given the severe taxing of judicial resources required by any such proceeding, it is difficult to justify a finding that a collective action is

---

[7] As noted above, class actions are also designed to facilitate suits by those with meritorious claims who might not otherwise file suit because the small size of their claims would render individual suits economically unfeasible. *Amchem Products,* 521 U.S. at 617. But that rationale is rarely implicated in employment discrimination claims. Due to the potential to recover large damage awards as well as attorney fees, the cost of bringing an individual suit is rarely a deterrent to the filing of meritorious employment discrimination claims.

"superior" to other methods of resolving the plaintiffs' claims. The Tenth Circuit's opinion does not even mention the Seventh Amendment issue. In contrast, conflicting appeals court decisions, such as *Smith v. Texaco,* cited Seventh Amendment concerns as a principal reason for decertifying a class on superiority grounds. *Smith*, 263 F.3d at 413-16. The Court should grant the petition in order to resolve this conflict.

Finally, the Tenth Circuit's determination that certifying a collective action would save judicial resources during stage one of the case (the determination of whether Petitioners maintained a pattern or practice of age discrimination) was based in large measure on its determination that Petitioners should be permitted to raise only a limited number of defenses during stage one. Pet. App. 16a-17a. In particular, the Tenth Circuit decision makes clear that Petitioners would *not* be permitted to argue during stage one that individual employment decisions were not made based on a pattern and practice of age discrimination. *Id.* As Petitioners point out, denying them the right to raise individualized issues at stage one raises serious constitutional concerns. Pet. 23. Yet, if a defendant introduces individualized issues at stage one (as it will surely do if allowed), then any judicial economy derived from certifying the class for purposes of deciding stage one issues will quickly dissipate.[8]

---

[8] Moreover, if an employer can show that none of the plaintiffs was subject to the employer's alleged pattern or practice of discrimination, then no plaintiff has standing to maintain a collective action. In the absence of at least one plaintiff with standing, a federal court lacks jurisdiction to make findings regarding the alleged pattern or practice or to issue an injunction against it. Accordingly, an

(continued...)

The Tenth Circuit's unwavering embrace of the multi-stage trial plan outlined in *Teamsters*, despite strong evidence that such plans are inappropriate in damages actions, is seriously flawed. The Tenth Circuit's approach is in direct conflict with that of several other federal appeals courts. The Court should grant review in order to resolve the conflict and to correct the Tenth Circuit's errors.

CONCLUSION

Amici curiae respectfully request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

Of Counsel:

Jan S. Amundson
General Counsel
Quentin Riegel
Deputy Gen'l Counsel
National Association of Manufacturers
1331 Pennsylvania Ave., NW
Washington, DC 20002-1790
(202) 637-3000

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: February 12, 2002

---

[8](...continued)
employer cannot be denied the right to introduce such individualized evidence during stage one of a *Teamsters* multi-stage trial, if for no other purpose than to challenge standing.

MOTION FILED
FEB 1 2 2002

No. 01-881

IN THE

Supreme Court of the United States

GENERAL ELECTRIC CAPITAL CORP., and
MONTGOMERY WARD CREDIT SERVICES, INC.,

Petitioners,

v.

GARY A. THIESSEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE UNITED STATES CHAMBER OF COMMERCE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

STEPHEN A. BOKAT
ROBIN S. CONRAD
JOSHUA A. ULMAN
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20026
(202) 463-5337

ZACHARY D. FASMAN*
PATRICK W. SHEA
CARLA R. WALWORTH
NEAL D. MOLLEN
PAUL, HASTINGS, JANOFSKY & WALKER LLP
75 East 55th Street
New York, NY 10022
(212) 318-6000

* *Counsel of Record*

172315

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to S. Ct. Rule 37.2, the Chamber of Commerce of the United States (the Chamber) moves for leave to file a brief *amicus curiae* in support of the Petition for a Writ of Certiorari to the Tenth Circuit. A copy of the proposed brief is attached. The Chamber is filing this Motion because Respondent has refused to consent to the filing of this brief. In further support of this Motion, the Chamber notes the following:

1. The Chamber is the world's largest federation of business companies and associations, with an underlying membership of nearly 3,000,000 businesses and professional organizations of every size, in every industry sector, and every region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of concern to American business.

2. One continuing concern of the American business community has been the proper interpretation and application of the employment discrimination laws in general, and the conduct of employment discrimination litigation in particular. The Chamber of Commerce, with the consent of the parties or the Court, has filed *amicus curiae* briefs in the Court in numerous recent employment discrimination cases, including *Toyota v. Williams*, 122 S. Ct. 681 (2002); *Circuit City Stores v. Adams*, 532 U.S. 105 (2001); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

3. The decision below creates and deepens significant and mature circuit splits of authority in an area of particular concern to the Chamber and its members — class action employment discrimination litigation. The Tenth Circuit, in contrast to decisions in other circuits, mandated the application of the two-stage proof paradigm established by the Court in *Teamsters v. United States*, 431 U.S. 324 (1977), to this case, a collective action brought under the Age Discrimination in Employment Act, and to virtually every other type of employment discrimination class action. The decision below raises significant Seventh Amendment and due process issues by mandating the continuing applicability of a bifurcated trial procedure that was adopted before jury trials were available in employment discrimination class actions. The Tenth Circuit also joined several sister circuits by precluding lower courts from conducting any meaningful analysis of evidence proffered by class representatives at the certification stage, claiming that such analysis is forbidden by the Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

4. In combination, the rulings below eliminate any judicial discretion on the part of the lower courts when determining whether to proceed with a class action, rendering such decisions little more than formalities. They also reflect the disarray in which the lower courts find themselves on the most fundamental questions posed in multi-party employment discrimination litigation. The Chamber believes that the instant case, as well as *Robinson v. Metro-North Commuter R.R. Co.*, 267 F. 3d 147 (2d. Cir.), *pet. for cert. filed*, 70 U.S.L.W. 3429 (2001) (No. 01-908), in which a writ of *certiorari* also is being sought with the Chamber's support, present exceptionally significant issues in this area with great clarity. The Chamber submits that its views on these issues would be useful to the Court in determining whether to grant the Petition, and in deciding the issues posed in the event that review is granted.

Accordingly, the Chamber respectfully moves the Court to grant this Motion and allow the filing of the attached brief.

Respectfully submitted,

ZACHARY D. FASMAN*
PATRICK W. SHEA
CARLA R. WALWORTH
NEAL D. MOLLEN
PAUL, HASTINGS, JANOFSKY
& WALKER LLP
75 East 55th Street
New York, NY 10022
(212) 318-6000

* *Counsel of Record*

TABLE OF CONTENTS

	Page
Motion for Leave to File Brief Amicus Curiae in Support of Petition for a Writ of Certiorari	i
Table of Contents	iv
Table of Cited Authorities	vi
Interest of the Amicus	1
I. Summary of Argument	1
II. Statement of the Case	5
III. Argument	8
A. The Lower Court's Requirement That A Class Be Certified To Preserve A "Procedural Advantage" Supposedly Derived From The Court's Decision In *Teamsters* Warrants Review.	8
1. The Decision Addresses An Issue Of Critical Importance On Which There Is Substantial Disagreement Among The Courts Of Appeals.	8
2. The Lower Court's Mandatory Resort To *Teamsters* To Preserve A "Procedural Advantage" For Plaintiffs Is Un-Workable, Unfair And Unnecessary.	11

Contents

Page

B. The Court Should Resolve Whether A District Court Is Required To Make Essential Findings Of Fact At The Class Certification Stage Even Though The Issues Overlap With The Merits Of The Case. 15

IV. Conclusion 18

TABLE OF CITED AUTHORITIES

Page

CASES

Adamson v. Bowen,
855 F.2d 668 (10th Cir. 1988) 15, 16

Allison v. Citgo Petroleum Corp.,
151 F.3d 402 (5th Cir. 1998) 4, 9, 13

Amchem Products, Inc. v. Windsor,
521 U.S. 591 (1997) 2

Anderson v. City of Albuquerque,
690 F.2d 796 (10th Cir. 1982) 15, 16

Ardrey v. United Parcel Service,
798 F.2d 679 (4th Cir. 1986) 12

Beck v. Boeing,
203 F.R.D. 459 (W.D. Wash. 2001) 5

Blair v. Equifax Check Services Inc.,
181 F.3d 832 (7th Cir. 1999) 12

Blyden v. Mancusi, 186 F.3d 252 (2d Cir. 1999) ... 13

Burlington Industries, Inc. v. Ellerth,
524 U.S. 742 (1998) i

Caridad v. Metropolitan-North R.R.,
191 F.3d 283 (2nd Cir. 1999), *cert. denied*,
529 U.S. 1107 (2000) 16

Cited Authorities

Page

Castano v. American Tobacco Co.,
84 F.3d 734 (5th Cir. 1996) 13, 17

Circuit City Stores v. Adams,
532 U.S. 105 (2001) i

Coates v. Johnson & Johnson,
756 F.2d 524 (7th Cir. 1985) 12

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) 15, 16

Deposit Guaranty Nat'l Bank v. Roper,
445 U.S. 326 (1980) 17

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974) ..... ii, 3, 16

Faragher v. City of Boca Raton,
524 U.S. 775 (1998) i

Furnco Construction Corp. v. Waters,
438 U.S. 567 (1978) 14

General Telephone Co. v. Falcon,
457 U.S. 147 (1982) 2, 4, 15, 16

Johnston v. HBO Film Management, Inc.,
265 F.3d 178 (3d Cir. 2001) 4, 17

Lorrilard v. Pons,
434 U.S. 575 (1978) 10

Cited Authorities

Page

Love v. Turlington,
733 F.2d 1562 (11th Cir. 1984) 17

Reeves v. Sanderson Plumbing Products, Inc.,
530 U.S. 133 (2000) i

In re Rhone-Poulenc Rorer, Inc.,
51 F.3d 1293 (7th Cir.), *cert. denied*,
516 U.S. 867 (1995) 11, 13, 17

Robinson v. Metropolitan-North Commuter R.R. Co.,
267 F.3d 147 (2d Cir.), *pet. for cert. filed*, 70
U.S.L.W. 3429 (2001) ..... ii, 3, 5, 9

Rutstein v. Avis Rent-A-Car Systems, Inc.,
211 F.3d 1228 (11th Cir. 2000), *cert. denied*, 121
S.Ct. 1354 (2001) 9

St. Mary's Honor Center v. Hicks,
509 U.S. 502 (1993) 14

Stastny v. Southern Bell Telegraph & Telegraph Co.,
628 F.2d 267 (4th Cir. 1980) 17

Sutton v. United Air Lines, Inc.,
527 U.S. 471 (1999) i

Szabo v. Bridegport Machines, Inc.,
249 F.3d 672 (7th Cir.), *cert. denied*, 122 S. Ct.
348 (2001) 4, 17

Teamsters v. United States,
431 U.S. 324 (1977) ..... *passim*

Cited Authorities

Page

Thiessen v. General Electric Capital Corp.,
267 F.3d 1095 (10th Cir. 2001), *pet. for cert. filed*,
70 U.S.L.W. 3410 (2001) ..... *passim*

Toyota v. Williams,
122 S. Ct. 681 (2002) i

In re Visa Check/Mastermoney Antitrust Litigation,
No. 00-7699, 2001 WL 1242717 (2d Cir. Oct. 17,
2001) 17

Western Electric Co. v. Steen,
544 F.2d 1196 (3d Cir. 1976) 12, 13

*Zachery v. Texaco Exploration
and Production, Inc.*,
185 F.R.D. 230 (W.D. Tex. 1999) 5

UNITED STATES CONSTITUTION

Seventh Amendment ..... ii, 3, 11, 13

STATUTE

29 U.S.C. § 216(b) 6

RULES

S. Ct. Rule 37.2 i

Fed. R. Civ. P. 23 ..... 6, 7, 16, 17, 18

Fed. R. Civ. P. 23(b)(2) 5

Fed. R. Civ. P. 23(f) 4, 12, 17

Page

SECONDARY SOURCES

Judicial Business of the United States: 2000 Report of the Director, Table X-4 2

Judicial Business of the United States Courts: 2000 Annual Report of the Director, Table C-2 ... 1

Keith R. Fentonmiller, *Damages. Jury Trials and the Class Action under the Civil Rights Act of 1991*, 12 Lab. Law. 421 (1997) 9

Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-the-Board Employment Discrimination Cases*, 15 Lab. Law. 415 (Winter/Spring 2000) 4, 9, 11

Willging, Hooper & Niemic, *Empirical Study Of Class Actions In Four Federal District Courts* (Fed. Judicial Ctr. 1996) 11

DOJ SPEC. REP., *Civil Rights Complaints in U.S. District Courts* 1990-1998 (January 2000) 1

Court Approves $192.5 Million Settlement In Race Bias Class Action Against Coca-Cola, Daily Labor Report (BNA) No. 127, 1-5 (July 3, 2001) 2

Texaco Corp. Agrees To Spend $176 Million to Settle Race Bias Suit, Daily Labor Report (BNA) No. 222, D-4 (Nov. 18, 1996) 2

Cited Authorities

Page

Judge Gives Final Approval to Settlement under which Publix will pay $81.5 million, Daily Labor Report (BNA) No. 102, D-26 (May 28, 1997) .. 2

Federal Court Certifies Boeing Class; Female Employees Allege Job Disparities, Daily Labor Report (BNA) No. 204, A-2 (Oct. 24, 2001) 4

Federal Judge Certifies Class Action In Black Worker's Suit Against Publix, Daily Labor Report (BNA) No. 57, A-3 (Mar. 25, 1999) 5

INTEREST OF THE AMICUS

The Chamber of Commerce of the United States (the Chamber) is identified in the preceding Motion for Leave to File. Its interest in this matter is more completely expressed in the preceding Motion for Leave to File and in the Summary of Argument section below, and thus will not be restated at further length in this section.[1]

I. SUMMARY OF ARGUMENT

1. Since 1991, when Congress first authorized the recovery of compensatory and punitive damages and provided for jury trials under Title VII of the Civil Rights Act, there has been an explosion of employment discrimination litigation in the federal courts. During the 1990's, the number of employment discrimination cases filed in the federal courts nearly tripled,[2] an increase matched by the number of employment discrimination class actions filed annually in the federal courts.[3] There currently are 170 employment discrimination class actions pending in the federal courts,

1. Pursuant to Sup. Ct. Rule 37.6, the Chamber affirms that neither Petitioners nor Respondent has assisted the Chamber or its counsel in any way (including but not limited to providing expenses) in connection with the preparation or filing of this brief.

2. 8,413 civil rights employment cases were filed in the federal courts in 1990; in 1998 23,375 such cases were filed. *See* DOJ SPEC. REP., *Civil Rights Complaints in U.S. District Courts 1990-1998*, (January, 2000), at 1-2 (concluding that "[t]he growth of civil rights cases has been due largely to the increase in employment cases between private parties."). *See also Judicial Business of the United States Courts: 2000 Annual Report of the Director*, at Table C-2 (reporting that 21,928 employment cases were filed in 2000).

3. *See 1999 Federal Court Class Action Statistics*, Class Action Reports, Table 6 (employment class actions rose from a low of 30 filed in 1992 to 85 filed in 1998).

affecting the lives and livelihoods of tens of thousands of American workers and their employers.[4] Many other employment discrimination class actions are no longer pending because they recently have been resolved through widely reported multi-million dollar settlements, setting the stage for additional class action litigation.[5]

2. Despite the substantial importance of these cases and the profusion of new litigation, the Court has not addressed employment discrimination class actions for two decades, and never has opined upon how the expansion of relief, and the availability of jury trials, affects multi-plaintiff employment discrimination litigation. Unguided by any recent rulings from the Court, the lower courts have failed to deal consistently or adequately with many of the exceptionally important legal issues that have arisen in such large and significant cases.

3. For example, despite the Court's specific admonition in *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982), that the lower courts cannot certify a class action absent a "rigorous analysis" to ensure that appropriate procedural requirements have been met,[6] numerous appellate courts —

---

4. *See Judicial Business of the United States: 2000 Report of the Director*, at Table X-4.

5. *See generally Court Approves $192.5 Million Settlement In Race Bias Class Action Against Coca-Cola*, Daily Labor Report (BNA) No. 127, at 1-5 (July 3, 2001); *Texaco Corp. Agrees To Spend $176 Million to Settle Race Bias Suit*, Daily Labor Report (BNA) No. 222, at D-4 (Nov. 18, 1996); *Judge Gives Final Approval to Settlement under which Publix will pay $81.5 million*, Daily Labor Report (BNA) No. 102, at D-26 (May 28, 1997).

6. 457 U.S. at 161. This admonition was repeated outside the employment discrimination context in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 633-636 (1997).

including the court below — have hamstrung district judges who have attempted to perform the required analysis by preventing them from engaging in any meaningful factual inquiry when deciding whether to proceed with a class action. According to the court below, and to several sister circuits,[7] virtually any analysis of facts in deciding whether to certify a class is an improper inquiry into the merits of the case of the sort forbidden by the Court in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), guaranteeing that mere allegations made by the class plaintiffs will suffice to warrant class certification.

4. Similarly, the court below demanded that district courts under its supervision apply the two-stage proof paradigm derived from the Court's decision in *Teamsters v. United States*, 431 U.S. 324 (1977), in virtually every employment discrimination class or collective action. By affording bare allegations of a pattern-or-practice of discrimination talismanic significance, the court below disposed of evident and troubling Seventh Amendment and due process questions about the propriety of a bifurcated trial procedure that was adopted by the Court under a different statute for bench trials prosecuted by the government in a representative capacity. The court of appeals gave no heed to whether this model makes sense when money damages are at issue, when the case is to be tried to a series of juries *seriatim*, or where the lawsuit is an opt-in action and has no representative character.

5. Where courts have adopted this uncritical approach to class actions, the result has been to diminish and in some cases all but to eliminate the plaintiffs' burden of proving that a particular case is suitable for class treatment, a result

---

7. *See, e.g., Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir.), *pet. for cert. filed*, 70 U.S.L.W. 3429 (2001) (No. 01-908).

directly at odds with the Court's ruling in *Falcon* and with the law in several other circuits.[8] Certifications based upon such questionable legal analysis have led to multi-million dollar settlements in which employers, facing huge liabilities and crushing legal fees following certification, have chosen to settle rather than to fight.[9]

6. At the same time, in other circuits where the burden of proof retains some rigor, class plaintiffs have attempted to circumvent the complications attendant to trying damage actions before juries by jettisoning any claim of absent class members to pursue compensatory or punitive damages or, in some instances, even trial by jury, opting instead to proceed without full relief.[10] The possibility that such a strategic

8. *See, e.g., Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 422 (5th Cir. 1998); *Szabo v. Bridegport Machines, Inc.*, 249 F.3d 672, 675 (7th Cir.), *cert. denied*, 122 S. Ct. 348 (2001) ("The proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it."); *Johnston v. HBO Film Management, Inc.*, 265 F.3d 178 (3d Cir. 2001).

9. As one commentator recently observed, "[o]nce plaintiffs obtain class certification, the defendant's exposure, plus projected costs of defending hundreds or thousands of individual claims, places almost overwhelming and irresistible pressure on the defendant to settle, regardless of the merits of the claims." Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-the-Board Employment Discrimination Cases*, 15 Lab. Law. 415, 417 (Winter/Spring 2000). *See also* Fed. R. Civ. P. 23(f), Adv. Comm. Notes (1998) ("An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.").

10. *Federal Court Certifies Boeing Class; Female Employees Allege Job Disparities*, Daily Labor Report (BNA) No. 204, at A-2 (Oct. 24, 2001) (attorney for class of Boeing employees noting that the class had not requested compensatory damages to minimize

(Cont'd)

decision might foreclose absent class members from obtaining full relief has led some courts to refuse to entertain such efforts,[11] while other courts have refused to allow the recovery of back pay in certified actions where the right to compensatory and punitive damages has been waived.[12]

7. Neither class members seeking relief nor employers facing enormous liability and huge legal fees are served by such dramatic uncertainty in the law. Respectfully, the Chamber submits that guidance by the Court on the impact of trial by jury and expanded remedies upon the maintenance and conduct of employment discrimination class actions is desperately required. For reasons more fully developed below and elsewhere, the instant case and the companion case of *Robinson v. Metro North Commuter R.R.*, No. 01-908, in which a writ of certiorari also is being sought with the support of the Chamber, are ideal vehicles for addressing these very significant issues and bringing necessary clarity to this field.

II. STATEMENT OF THE CASE

Respondent Gary A. Thiessen ("Respondent" or "Thiessen") is a former employee of Petitioners Montgomery Ward Credit Services, Inc. ("MWCS") and General Electric Capital Corp. ("GECC"). In 1996, Thiessen commenced an age discrimination action on behalf of himself and other

(Cont'd)
certification problems under Fed. R. Civ. P. 23(b)(2)); *Federal Judge Certifies Class Action In Black Worker's Suit Against Publix*, Daily Labor Report (BNA) No. 57, at A-3 (Mar. 25, 1999) (class counsel in suit against Publix commenting on decision to forego damages, withdraw jury demand and strike employer's jury demand).

11. *See Zachery v. Texaco Exploration and Production, Inc.*, 185 F.R.D. 230 (W.D. Tex. 1999).

12. *See Beck v. Boeing*, 203 F.R.D. 459 (W.D. Wash. 2001).

"similarly situated" current and former employees of Petitioners, alleging that Petitioners had developed a "blocker policy" that was used to identify older workers who were "blocking" younger workers from being promoted. *Thiessen v. General Elec. Capital Corp.*, 267 F.3d 1095, 1100 (10th Cir. 2001). This alleged policy purportedly included the creation of a list of "blockers" who were targeted for various adverse employment actions, including negative employment evaluations, demotions and termination. *Id.* at 1100-01.

In 1998, the district court conditionally certified a class of opt-in plaintiffs under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 216(b).[13] Although the opt-ins alleged disparate adverse employment actions reaching across a number of states, the court concluded that Thiessen's evidence of a company-wide policy of age discrimination rendered the opt-ins "similarly situated" for purposes of conditional certification. *Id.* at 1101. The court indicated that it would reconsider certification after discovery. *Id.* at 1101-02.

After discovery, the district court decertified the class and dismissed the opt-in plaintiffs without prejudice to any individualized claims they might later bring. The court found that Thiessen was not "similarly situated" to the proposed class, because there was no evidence linking the "blocker

---

13. The ADEA borrows the collective action framework Congress first adopted for the Fair Labor Standards Act ("FLSA"), rather than the class action procedures of Fed. R. Civ. P. 23. Under the ADEA's opt-in procedure, individuals with claims who are "similarly situated" can affirmatively opt in to the litigation and have their claims heard as part of the same suit. Although the terminology and procedures used in the FLSA vary somewhat from those applicable under Fed. R. Civ. P. 23, as the court of appeals acknowledged, there is little practical difference between the ADEA's "similarly situated" test and Rule 23's commonality and typicality requirements. *See Thiessen*, 267 F.3d at 1105.

policy" and the challenged adverse employment actions. *Id.* at 1103-04. Further, the court determined that individual issues would predominate at trial given the individualized defenses asserted by defendants. *Id.* at 1104. Finally, the court held that plaintiffs' proposed two-stage trial plan, based on *Teamsters v. United States*, 431 U.S. 324 (1977), would "render individualized consideration of the claims impossible and impose extraordinary burdens on the jury." *Id.* at 1105 (citation omitted).

Respondent appealed the decertification decision and the Tenth Circuit reversed. Relying upon Rule 23 cases in that circuit, the court below held that the district court erred because its decision that the plaintiffs were not similarly situated "encompass[ed] factual issues relevant to [the pattern-or-practice] trial" on the merits, an inquiry forbidden at this preliminary stage of the case. *Id.* at 1106.

The court also held that, given the pattern-or-practice allegation, application of the two-stage trial plan outlined in *Teamsters* was mandatory, because failing to follow the *Teamsters* paradigm would "effectively deprive[] plaintiffs of [the] procedural advantage" that, "if plaintiffs were able to establish a pattern or practice of discrimination [in the first stage of trial], they would be entitled to a presumption that the individual employment actions taken against them were the result of such discrimination." *Id.* at 1107.[14] At the same time, to address the manageability issues raised by the district court, the circuit court held that in Phase I of a bifurcated trial in which plaintiffs sought to prove the

14. The court added that "[w]e do not hold that whenever there is evidence of a pattern-or-practice, a class must be certified." *Id.* at 1108. But this disclaimer rings hollow given the court's holding that: 1) application of the *Teamsters* paradigm is mandatory in a pattern-or-practice case; and 2) as a result of the need to apply this paradigm, the requirements for a class action are satisfied. *See id.* at 1106-07.

existence of a pattern-or-practice of discrimination, Petitioners would be limited in their proof to evidence concerning "a few common defenses." *Id.* Individualized proof concerning whether the "blocker" policy had been applied to the particular class members would be relegated to Phase II of the trial, assuming plaintiffs had successfully proven a pattern-or-practice. The Tenth Circuit remanded the case to the district court, directing that the matter proceed as a collective action. A timely petition for a writ of certiorari followed.

III. ARGUMENT

A. THE LOWER COURT'S REQUIREMENT THAT A CLASS BE CERTIFIED TO PRESERVE A "PROCEDURAL ADVANTAGE" SUPPOSEDLY DERIVED FROM THE COURT'S DECISION IN TEAMSTERS WARRANTS REVIEW.

1. The Decision Addresses An Issue Of Critical Importance On Which There Is Substantial Disagreement Among The Courts Of Appeals.

In *Teamsters v. United States*, 431 U.S. 324 (1977), the Court endorsed a bifurcated proof scheme for managing so-called "pattern-or-practice" cases brought by the federal government under Title VII. Although the Court specifically observed that "not all class actions will necessarily follow [this] model," 431 U.S. at 360, without any further guidance from the Court as to how and where this paradigm might profitably be employed, the lower courts have applied this paradigm to very different kinds of cases. *Teamsters* was a government action; the courts of appeals have applied it to cases brought by private litigants. In *Teamsters*, the government sought injunctive and other equitable relief; several courts of appeals have applied it to damage actions.

Teamsters was tried to the bench; certain courts of appeals have tried to force-fit *Teamsters* into the jury trial milieu. The court below went as far as it is possible to go with *Teamsters*; it compelled the district courts it supervises to use the framework even in ADEA collective actions, which are brought under an entirely different statute and have no representative character at all.

The Tenth and the Second Circuits effectively require that their district courts apply the *Teamsters* paradigm in virtually every multi-plaintiff employment discrimination class action. *See Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 169 n.13 (2d Cir. 2001). The Fifth and Eleventh Circuits, by contrast, have held that the *Teamsters* framework is largely unworkable when applied to large-scale class actions where substantial damages are sought and there is a right to trial by jury. *See, e.g., Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 419 (5th Cir. 1998); *Rutstein v. Avis Rent-A-Car Systems, Inc.*, 211 F.3d 1228 (11th Cir. 2000), *cert. denied*, 121 S. Ct. 1354 (2001). Commentators have repeatedly questioned whether *Teamsters* is applicable in cases where damages are sought or where a jury trial is required.[15]

The substantial disagreement among the circuits is not surprising when one recalls that the *Teamsters* paradigm was developed almost 25 years ago, when damages were not available under Title VII of the Civil Rights Act of 1964,

---

15. *See generally* Kramer, *supra*, note 9, at 475-76 (*Teamsters* paradigm not automatically applicable in cases involving jury trials and legal relief); Keith R. Fentonmiller, *Damages, Jury Trials and the Class Action Under the Civil Rights Act of 1991*, 12 Lab. Law. 421, 441-42 (1997) ("it is questionable whether the *Teamsters* approach of bifurcating liability and damages issues is constitutional now that Title VII affords a right to jury trial and damages.").

before jury trials were held available under the ADEA,[16] and when large scale jury trials in employment discrimination cases were essentially non-existent. The fundamental nature of employment discrimination cases has since changed drastically, particularly following enactment of the Civil Rights Act of 1991, which makes damages and jury trials generally available in disparate treatment cases. In light of this sea change, the Court urgently needs to address the issues arising from the attempts of lower courts, including the Tenth Circuit, to superimpose the framework for equitable relief endorsed in *Teamsters* on this new legal landscape.

The need for review is all the more acute given the rising tide of employment discrimination class actions noted above. The split among the circuits presents a particularly serious problem for Chamber members with nationwide operations, as sophisticated class action counsel can and will engage in forum shopping when launching a nationwide class action. In such cases, the geographic breadth of the Second and Tenth Circuits offers ready access to the *de minimis* class certification standards recognized in *Thiessen* and *Robinson*. The fundamentals of federal law should not depend on geographic happenstance. There is an acute need for review by the Court to secure uniformity of decision on this important issue.

---

16. The Court first held that jury trials were available in ADEA cases in *Lorrilard v. Pons*, 434 U.S. 575 (1978).

2. The Lower Court's Mandatory Resort To *Teamsters* To Preserve A "Procedural Advantage" For Plaintiffs Is Unworkable, Unfair And Unnecessary.

By insisting that the lower courts apply the proof paradigm derived from *Teamsters* in every class action in which a pattern-or-practice of discrimination is alleged, the court below has created intractable legal problems that warrant review by the Court. The *Teamsters* model cannot be administered in a case like this without impairing a defendant's rights under the Seventh Amendment and the Due Process Clause.

As the district court noted, a trial of a class action involving as many as 30 opt-in plaintiffs will require individualized consideration of widely varying adverse employment actions spanning nearly ten years. *See Thiessen*, 267 F.3d at 1101-04. Attempting to try this multitude of issues in a single action is usually completely unworkable. As a consequence, once a broad-based class action is certified, a settlement becomes mandatory; there is no practical alternative. *See In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298-99 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995) (noting the "intense pressure to settle" imposed by the possibility of a huge judgment); Kramer, *supra*, note 9, at 417. This conventional wisdom among practitioners is confirmed by the limited empirical evidence that is available. Diligent research has disclosed no reported case in which a *Teamsters*-type action of any size was tried to the completion of Phase II proceedings before a jury. *See also* Willging, Hooper & Niemic, *Empirical Study Of Class Actions In Four Federal District Courts*, at 66-67 (Fed. Judicial Ctr. 1996) (study of all class actions terminated during a two year period in four judicial districts reported only one certified *Teamsters* class action, which settled after "protracted" proceedings).

To avoid the multitude of individualized claims that the district court properly believed made this case unsuitable for class or collective treatment, the Tenth Circuit ordered a Phase I jury trial of plaintiffs' so-called pattern-or-practice claims limited to the question of whether "a pattern or practice of discrimination [existed] and whether it continued after the fall of 1994." *Thiessen*, 267 F.3d at 1107. On this critical issue, the court intimated that Petitioners could only present evidence concerning "a few common defenses" and would be precluded from presenting "'highly individualized' defenses to each of the incidents of individual discrimination alleged by plaintiffs. . . ." *Id.*

The most effective means of rebutting plaintiffs' claim that the "blocker" policy continued in effect after the fall of 1994, however, will likely be to review individual employment decisions that occurred after that date to demonstrate that they were non-discriminatory. *See Ardrey v. United Parcel Service*, 798 F.2d 679, 683 (4th Cir. 1986) (recognizing employer's right to defend itself in pattern-or-practice case by proving that individual actions were justified by non-discriminatory reasons); *Coates v. Johnson & Johnson*, 756 F.2d 524, 532 (7th Cir. 1985) (same). By precluding introduction of such highly probative evidence at Phase I, the Tenth Circuit acted contrary to the Court's admonition in *Teamsters*, 431 U.S. at 360 n.46 (noting that in Phase I "[w]e do not mean to suggest that there are any particular limits on the type of evidence an employer may use"), and established a procedure that will inevitably preclude the defendant from presenting its most effective defense at the most significant stage of the litigation, where an overbroad order can "force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."[17] This is a clear denial of due process. *See Western*

17. Fed. R. Civ. P. 23(f), Adv. Comm. Notes (1998). This overwhelming pressure exists "even when the plaintiff's probability of success on the merits is slight." *Blair v. Equifax Check Servs. Inc.*, 181 F.3d 832, 835 (7th Cir. 1999).

Electric Co. v. Steen, 544 F.2d 1196, 1199 (3d Cir. 1976) ("[T]o deny [an employer] the right to present a full defense on the issues would violate due process.").

The Tenth Circuit's procedure also threatens Petitioners' jury trial rights. Under the Re-Examination Clause of the Seventh Amendment,[18] "[t]he right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have juriable issues determined by the first jury impaneled to hear them (provided there are no errors warranting a new trial), and not reexamined by another finder of fact." *Rhone-Poulenc*, 51 F.3d at 1303. An employer thus has the right to have a single jury consider all facts and evidence relevant to the pattern-or-practice claim. *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 419 (5th Cir. 1998) (affirming denial of motion for class certification where potential overlap of issues to be decided in bifurcated proceedings "implicated significant Seventh Amendment" concerns). By asking one jury to consider only generalized evidence concerning the "blocker" policy and by demanding that a series of subsequent juries consider the overlapping question of whether the policy was ever applied to a particular class member, the lower court's decision strips the employer of this important procedural protection and prevents it from presenting a comprehensive defense to a single finder of fact. *See also Blyden v. Mancusi*, 186 F.3d 252, 268 (2d Cir. 1999); *Castano v. American Tobacco Co.*, 84 F.3d 734, 750-51 (5th Cir. 1996).

This unfair and unworkable procedure is allegedly justified to provide plaintiffs with a "procedural advantage" allegedly derived from *Teamsters* which reduces their burden of proof at the second stage of a bifurcated trial. But the shifting burdens of proof outlined in *Teamsters* do not

---

18. *See* U.S. Const. Amend. VII ("[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.")

constitute a substantive right under the employment discrimination laws. To the contrary, as the Court has emphasized on a number of occasions, such presumptions merely constitute possible methods of analyzing what is always plaintiff's fundamental burden — to prove intentional discrimination. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 514 (1993) (observing that although the court "may, according to traditional practice, establish certain modes and orders of proof" such evidentiary aides do not "substitute for the required finding that the employer's action was the product of unlawful discrimination."); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (stating that the burden shifting test under *McDonnell Douglas* "was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.").

Teamsters described an orderly mechanism for dealing with a particular type of case. The court of appeals took this helpful procedural tool, extended it to a type of case that shares none of *Teamsters* defining characteristics, and transformed it into an inalienable right. Unfortunately, the court of appeals is not alone; in the 25 years since *Teamsters*, the tool has taken on a life of its own in the lower courts and has assumed a role the Court never intended. The Court should take this occasion to consider application of the *Teamsters* paradigm to circumstances never considered at the time it was created.

B. THE COURT SHOULD RESOLVE WHETHER A DISTRICT COURT IS REQUIRED TO MAKE ESSENTIAL FINDINGS OF FACT AT THE CLASS CERTIFICATION STAGE EVEN THOUGH THE ISSUES OVERLAP WITH THE MERITS OF THE CASE.

The district court found that this case could not proceed as a class action, because, *inter alia*, there was no common policy linking the disparate employment actions plaintiffs sought to challenge and there was no evidence that members of the class had been impacted by an alleged "blocker" policy. The Tenth Circuit reversed, concluding that although this finding may have been necessary to determine if a class action was proper, it overlapped with the merits of plaintiffs' claims. Relying on two earlier cases it had decided under Title VII,[19] the court below held that fact finding at the class certification stage is improper when the factual issues overlap with the merits.

The Tenth Circuit's decision is squarely contrary to *General Telephone Co. v. Falcon*, 457 U.S. at 147 (1982). In that case, the Court recognized that class certification issues and merit issues often overlap. *See id.* at 160 (noting that "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'") (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978)). Despite this overlap, the Court held that "we reiterate today that a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." 457 U.S. at 161.

---

19. *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988); *Anderson v. City of Albuquerque*, 690 F.2d 796, 799 (10th Cir. 1982).

By ignoring *Falcon* and prohibiting findings on class certification that overlap with the merits, the Tenth Circuit deepened a mature split among the circuits. The Second Circuit, for example, has also held that "[in] deciding a certification motion, district courts must not consider or resolve the merits of the claims of the purported class." *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 293 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000). The court held that it was an abuse of discretion for the lower court to consider the employer's critique of statistics proffered by the named plaintiffs in that case, recognizing that while this critique "may prove fatal at the merits stage . . . this sort of 'statistical dueling' is not relevant to the certification decision." *Id.* at 292.

In reaching these erroneous conclusions, both the Second and Tenth Circuits have relied on a flawed reading of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).[20] There, the district court conducted a mini-trial to determine whether plaintiffs stood a likelihood of succeeding on the merits in order to determine which party would bear the expense of giving notice to the class. Finding no provision in Rule 23 that could be read to authorize such a procedure, the Court found its use improper, and added: "[N]othing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Id.* at 177. The district court in *Eisen*, however, determined the merits of the case frontally; it decided whether the plaintiffs were likely to prevail on the merits in order to decide a procedural motion that was not authorized by Rule 23. By contrast, the Court's subsequent decisions in *Livesay* and *Falcon* squarely establish that a district court may — indeed, must — determine whether the requirements

---

20. The court below did not expressly rely on *Eisen*, but its earlier decisions in *Adamson* and *Anderson* did.

of Rule 23 have been met, even when that inquiry overlaps with the merits. The majority of circuits have so held.[21]

The question of the proper approach to fact finding on class certification represents a critical issue that warrants review by the Court. As the Court has noted, "[a] district court's ruling on the certification issue is often the most significant decision rendered in these class-action proceedings." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). As noted above, if a class is certified, a settlement is often compelled, even for cases that lack merit, because continuing with litigation "run[s] the risk of potentially ruinous liability." *See* Fed. R. Civ. P. 23(f), Adv. Comm. Notes (1998).

The issue presented by this case also has broad applicability to cases outside the employment context. Indeed, many of the cases that address whether a court may make findings related to class certification that also overlap the merits arise in such diverse areas as: the antitrust laws, *see In re Visa Check/Mastermoney Antitrust Litigation*, No. 00-7699, 2001 WL 1242717 (2d Cir. Oct. 17, 2001); breach of warranty claims, *Szabo*, 249 F.3d at 674-76; securities violations, *Johnston*, 265 F.3d at 180; products liability claims, *Rhone-Poulenc*, 51 F.3d at 1294; and mass torts, *Castano*, 84 F.3d at 744.

In the Second and Tenth Circuits, the path to class certification involves no "rigorous analysis," only a pro forma glance at the plaintiffs' affidavits. Even if these affidavits are implausible on their face and contradicted by compelling

---

21. *See, e.g., Johnston v. HBO Film Management, Inc.*, 265 F.3d 178 (3d Cir. 2001); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 674-76 (7th Cir. 2001); *Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984); *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 274 (4th Cir. 1980).

evidence, the district court has no options; certification is required. This should not be the law in any circuit. The Court should address this recurrent issue and reemphasize that compliance with class certification requirements must be demonstrated, not presumed.

IV. CONCLUSION

In combination, the lower court's two erroneous rulings make the class certification process little more than a formality. They also reflect the disarray in which the lower courts find themselves on the most fundamental questions posed in Rule 23. These problems are exacerbated by the changes wrought by the Civil Rights Act of 1991, which at once made employment law class actions more numerous, the applicable law more complex, and the application of the Court's prior decisions less clear. As a result, the rule of law applicable in a given case now depends upon where the employer is located or, in the case of an employer with nationwide facilities, on where the lawsuit happens to be filed. The Chamber submits that this state of affairs is untenable, and urges the Court to grant review in this case to reestablish the ground rules applicable to employment discrimination class actions.

Respectfully submitted,

STEPHEN A. BOKAT
ROBIN S. CONRAD
JOSHUA A. ULMAN
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20026
(202) 463-5337

ZACHARY D. FASMAN*
CARLA R. WALWORTH
PATRICK W. SHEA
NEAL D. MOLLEN
PAUL, HASTINGS, JANOFSKY & WALKER LLP
75 East 55th Street
New York, NY 10022
(212) 318-6000

* *Counsel of Record*

Supreme Court, U.S.
FILED
FEB 22 2002
CLERK

(6)

No. 01-881

IN THE

Supreme Court of the United States

GENERAL ELECTRIC CAPITAL CORP., d/b/a GE CAPITAL, MONTGOMERY WARD CREDIT SERVS., INC., f/k/a, MONOGRAM RETAILER CREDIT SERVICES, INC.,

Petitioners,

v.

GARY A. THIESSEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONERS

STEVEN T. CATLETT
JONES, DAY, REAVIS & POGUE
77 West Wacker Drive
Chicago, IL 60601
(312) 782-3939

GLEN D. NAGER
(Counsel of Record)
LAWRENCE D. ROSENBERG
DOMINICK V. FREDA
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

Counsel for Petitioners

13pp

TABLE OF AUTHORITIES

Page

Cases

Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998) 6, 7
Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996) 7
Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) 10
Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 5
Hipp v. Liberty National Life Insurance Co., 252 F.3d 1208 (11th Cir. 2001), *cert. denied*, 2002 WL232923 (Feb. 19, 2002) 10
Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165 (1989) 2
Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999 (11th Cir. 1997) 8
Kolstad v. American Dental Association, 527 U.S. 526 (1999) 6
Lorillard v. Pons, 434 U.S. 575 (1978) 6
Lusardi v. Xerox Corp., 118 F.R.D. 351 (D.N.J. 1987), *rev'd in part on other grounds*, 855 F.2d 1062 (3d Cir. 1988) 6
Mooney v. Aramco Services Co., 54 F.3d 1207 (5th Cir. 1995) 2, 4, 5
Murray v. Auslander, 244 F.3d 807 (11th Cir. 2001) 8
National Railroad Passenger Corp. v. Morgan, No. 00-1614 10
In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995) 3, 4
Robinson v. Metro-North Commuter Railroad, 267 F.3d 147 (2d Cir.), *pet. for cert. filed*, 70 U.S.L.W. 3429 (Dec. 17, 2001) (No. 01-908) 5, 7, 10

TABLE OF AUTHORITIES
(Continued)

Page

Rutstein v. Avis Rent-A-Car Systems., Inc., 211 F.3d 1228 (11th Cir. 2000), *cert. denied*, 121 S. Ct. 1354 (2001) 6, 7, 8
Smith v. Texaco, Inc., 263 F.3d 394 (5th Cir. 2001), *op. withdrawn*, 2002 WL 131415 (Feb. 1, 2002) 6, 7
Stastny v. Southern Bell Telephone & Telegraph Co., 628 F.2d 267 (4th Cir. 1980) 4
Szabo v. Bridgeport Machines., Inc., 249 F.3d 672 (7th Cir.), *cert. denied*, 122 S. Ct. 348 (2001) 3, 4
Teamsters v. United States, 431 U.S. 324 (1977) 1
TRW, Inc. v. Andrews, 123 S. Ct. 441 (2001) 9

Statutes & Rules

29 U.S.C. § 216(b) 2
Fed. R. Civ. P. 23 ..... 2, 5

Miscellaneous

Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* (7th ed. 1993) 1

REPLY BRIEF FOR PETITIONERS

As the petition demonstrated (Pet. 9-16), the decision below deepens a circuit split on the question whether a district court may make factual findings on class certification issues that overlap with the merits of the case. Petitioners further demonstrated (Pet. 16-24) that the decision below deepens a circuit split on the question whether a district court must use the multi-stage trial plan embraced in *Teamsters v. United States*, 431 U.S. 324 (1977), in deciding whether to certify a class seeking to litigate juriable claims for legal relief. Finally, petitioners showed (Pet. 25-30) that the decision below deepens circuit splits on three distinct questions concerning the "continuing violation" doctrine — (1) whether that doctrine can be applied to resurrect a single plaintiff's stale claims; (2) whether that doctrine can be applied to resurrect the stale claims of other putative plaintiffs; and (3) whether that doctrine applies to discrete employment actions, such as terminations. The *amici* filings of the U.S. Chamber of Commerce, the National Association of Manufacturers, and the Washington Legal Foundation confirm the importance of these issues and the need for this Court's prompt attention to them. Respondent's opposition is unfounded.

1. Respondent initially errs in suggesting (Opp. 1-2) that review by this Court is premature because "[n]o final ruling has been made" and "[t]he law and facts of this case are not fully developed . . . ." The district court here entered a final judgment disposing of the entire case, dismissing eight putative plaintiffs on timeliness grounds, decertifying the remainder of the putative class, and granting summary judgment against the principal plaintiff. Based upon the record that already exists, the court below then held that, in doing so, the district court had committed three distinct legal errors. The court below did not envision that further proceedings in this case would in any way affect these three legal rulings. This case thus fits squarely into the category of interlocutory judgments that this Court routinely reviews. *See* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* 196 (7th ed. 1993) ("where . . . there is some important and

clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status") (citing numerous cases).

2. Respondent next argues (Opp. 2-10) that this case does not properly present the question whether a district court may make factual findings on class certification issues that overlap with the merits. This argument is in error.

a. Contrary to respondent's suggestion, it does not matter that this case is technically subject to 29 U.S.C. § 216(b) rather than to Rule 23 of the Federal Rules of Civil Procedure. The decision below is not so limited. As the court below noted (Pet. App. 8a-10a), this Court and others routinely look to Rule 23 authorities in deciding questions under 29 U.S.C. § 216(b). *See, e.g., Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 171 (1989); *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213-15 (5th Cir. 1995). Moreover, in deciding this case, the court below expressly held that "there is little difference" between Section 216(b) and Rule 23 and that both provisions "allow for consideration of the same or similar factors, and generally provide a district court with discretion to deny certification for trial management reasons." Pet. App. 13a. Even more critically, in holding that the district court here erred in making "findings" on certification issues that overlap with the merits, the court below expressly relied on Rule 23 cases. Pet. App. 16a. Indeed, while respondent makes rhetorical use of the Section 216(b)/Rule 23 distinction, he nowhere suggests that this distinction makes any difference in the analysis. Accordingly, this case is an excellent vehicle for addressing the question whether a district court may properly make findings on class issues that overlap with the merits, as the court below effectively held that *neither* Section 216(b) nor Rule 23 allow a district court to do so.

b. Respondent further errs in suggesting (Opp. 3-4) that the question whether a district court may make findings on class issues that overlap with the merits is not presented,

because the district court's error here was in going further and deciding the ultimate question of discrimination itself. As the district court stated:

> Contrary to plaintiffs' position, the court is not resolving the underlying merits of plaintiffs' claims. In requiring evidence of a link between the policy and the challenged employment actions, the court does not determine whether plaintiffs may individually state a cause of action or whether plaintiffs may ultimately prevail on the merits. . . . The court is simply determining whether the requirements of § 216(b) have been satisfied where, as here, plaintiffs concede that the only possible common thread among the plaintiff group is the existence of the blocker policy and adverse job actions which plaintiffs attribute, without more, to the application of the policy.

Pet. App. 62a. In reversing the district court, the Tenth Circuit did not take issue with this statement or deny that the district court's finding concerned whether common claims were actually presented. Rather, the Tenth Circuit held that the district court could not make such commonality findings because they *also* "necessarily encompasse[d] factual issues relevant to" the merits. *See* Pet App. 15a-16a; *see also* Pet App. 10a-12a. Thus, the circuit conflict is squarely presented.

c. For similar reasons, respondent plainly errs in disputing (Opp. 4-6, 7-9) that the decision below is in conflict with the decisions of other courts. As noted in the petition (at 10-13), the Third, Fourth, Fifth and Seventh Circuits have held that a district court *must* make factual findings on all issues necessary for a proper class determination, even if those issues overlap with the merits.

Contrary to respondent's suggestion (Opp. 4-8), the decisions in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995), and *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir.), *cert. denied*, 122 S. Ct. 348 (2001), cannot be distinguished on the ground that the former involved "mass

tort" litigation and the latter involved "breach of warranty and fraud." Nor can they be distinguished by reference to the volume of the records in the respective cases, respondent's perception of the strength of his evidence of alleged discrimination, or the precise stage of the proceedings at which the class certification decision is made. These distinctions proffered by respondent are irrelevant to the core legal question whether a district court may make findings on class issues that overlap with the merits — and that is the question on which the Seventh Circuit and the court below directly conflict. *Compare Rhone Poulenc*, 51 F.3d at 1299-1300, and *Szabo*, 249 F.3d at 675-77, *with* Pet. App. 15a-16a.

Likewise, respondent's attempt (Opp. 8-9) to minimize the conflict between the decision below and *Stastny v. Southern Bell Telephone & Telegraph Co.*, 628 F.2d 267 (4th Cir. 1980), does not withstand analysis. Again, contrary to respondent's assertion, it is immaterial that the trial court in *Stastny* made its findings on class certification at trial. What matters is that the Fourth Circuit squarely held that because "the class action and merit inquiries essentially coincide," a "fair determination of the propriety of class action may be exceedingly difficult without conducting an inquiry roughly comparable to that required to resolve the 'pattern and practice' issue on the merits" (*id.* at 274), which is the very inquiry that the decision below bars as a matter of law. Indeed, respondent's concession (Opp. at 8) that "it was permissible for the Court [in *Stastny*] to make factual determinations concerning class requirements" is fatal to his defense of the decision below.

Respondent's argument (Opp. 9) that there is no conflict between the decision below and the Fifth Circuit's decision in *Mooney* is similarly mistaken. While the Fifth Circuit in *Mooney* did not endorse any specific criteria for the "similarly situated" inquiry, it sanctioned the substantial factfinding on certification issues in which the district court there engaged, even though those issues overlapped the merits of that ADEA

case. *See* 54 F.3d at 1214-16. *Mooney* and the decision below are thus irreconcilable.

d. Finally, respondent erroneously suggests (Opp. 9-10) that the question presented is not a "recurring problem" requiring this Court's prompt attention. Contrary to respondent's position, the issue is not precisely how many *employment* class actions are pending in the federal courts, but rather is how many class actions *of all subject matter* are pending. As respondent's own discussion indicates, there are thousands pending, and thousands more filed each year. Thus, as the *amici* filings confirm (WLF Br. 5, 17; Chamber Br. 4, 17), the question whether a district court may make factual findings on certification issues that overlap with the merits is profound — especially in light of the immense pressure for the defendant to settle once a class is certified, *see, e.g., Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). The importance of the issue is in fact confirmed by the pendency of another petition raising the same issue. *See Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 163-64 (2d Cir.), *pet. for cert. filed*, 70 U.S.L.W. 3429 (Dec. 17, 2001) (No. 01-908). This Court's immediate review is warranted.

3. Respondent next contends (Opp. 10-15) that this case is not a proper vehicle for resolving the split regarding whether a district court must use the multi-stage trial plan embraced in *Teamsters* in deciding whether to certify a class seeking legal relief on juriable claims. This contention also is in error.

a. Contrary to respondent's suggestion (Opp. 10), this case directly presents the circuit split posed by the petition. While the cases cited in the petition arose under various laws in Rule 23 cases, those cases did not turn on the nuances of the particular laws or on the fact that they were Rule 23 cases (as opposed to cases under other collective action rules). Rather, those cases turned on their determination that, in the context of juriable claims seeking legal relief, a district court is not required to apply, and may abuse its discretion if it applies, the *Teamsters* multi-stage trial plan in deciding whether to certify

a class. *See, e.g., Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1239 (11th Cir. 2000) (42 U.S.C. § 1981), *cert. denied*, 121 S. Ct. 1354 (2001); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 421-22 (5th Cir. 1998) (Title VII); *see also Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 373-80 (D.N.J. 1987) (ADEA), *rev'd in part on other grounds*, 855 F.2d 1062 (3d Cir. 1988). In contrast, although the district court here held (Pet. App. 121a, 124a) that application of the *Teamsters* multi-stage trial plan to juriable ADEA claims for legal relief would be unmanageable, prejudicial and subject to serious constitutional challenges, the Tenth Circuit held (Pet. App. 13a-18a) that application of the *Teamsters* multi-stage trial approach is mandatory. This holding presents a square conflict about the proper application of *Teamsters*. That these juriable claims for legal relief arose under the ADEA rather than Title VII (or Section 1981) was of no significance to the Tenth Circuit, and thus has no bearing on the appropriateness of certiorari review.

b. Respondent errs in suggesting (Opp. 10-12) that "this case is not a proper vehicle for resolving" the circuit split because, "[i]n this ADEA case, compensatory damages are unavailable." This misstates the circuit split. The issue is not whether the *Teamsters* multi-stage trial plan is mandatory in cases involving compensatory damages. Rather, as the petition explains (Pet. 16-20), the circuit split is about whether the *Teamsters* multi-stage trial plan is mandatory in cases involving *juriable* claims for *legal* relief. This Court has held that ADEA claims for back pay and liquidated damages are juriable claims for legal relief. *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 578-84 (1978); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 537 (1999) (applying ADEA liquidated damages standard to punitive damages under Title VII). Thus, this case squarely joins issue on the question dividing the circuits.

c. Respondent further errs in arguing (Opp. 11) that the Fifth Circuit's withdrawal of its opinion in *Smith v. Texaco,*

Inc., 263 F.3d 394 (5th Cir. 2001), *op. withdrawn*, 2002 WL 131415 (Feb. 1, 2002), diminishes the degree of judicial conflict over the question presented. *Smith* was withdrawn only because the parties settled. *See* 2002 WL 131415, at *1. Moreover, *Smith* itself merely restated prior Fifth Circuit precedent that continues to conflict with the Tenth Circuit's decision below. For example, in holding (263 F.3d at 409-10) that "applying *Teamsters* to require certification was improper, since the case 'as a whole' must satisfy the certification requirements," *Smith* was relying upon *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996). Likewise, *Smith* looked to *Allison*, 151 F.3d at 419-20, in holding that the need for "individualized proof" counseled strongly against certification. 263 F.3d at 410, 413. And, *Allison*, in turn, relied upon *Castano* for the proposition — recounted in *Smith*, 263 F.3d at 410 — that, "[u]nder such circumstances, an action conducted nominally as a class action would 'degenerate in practice into multiple lawsuits separately tried.'" 151 F.3d at 419 (quoting *Castano*, 84 F.3d at 745 n.19). In fact, the Second Circuit, which agrees with the Tenth Circuit's position on this point (Pet. 17-18), recognized *Smith* as a mere restatement of existing Fifth Circuit law in declining to follow both *Smith* and *Allison*. *See Robinson*, 267 F.3d at 163-64.

d. Respondent similarly errs (Opp. 11-12) in his misguided effort to distinguish *Rutstein*. While *Rutstein* noted that *Teamsters* is applied primarily in employment discrimination cases, it held that *Teamsters* was inapplicable where juriable claims for legal relief are involved, because, "*more important[ly]*, the relief to which individual plaintiffs were entitled after a finding of a pattern or practice of discrimination in *Teamsters* (and in all subsequent cases employing the *Teamsters* rationale) was *equitable* in nature." *Id.* at 1239 (emphasis added). The *Rutstein* court noted that "[t]he *Teamsters* framework is, therefore, inappropriate" where "establishment of a policy or practice of discrimination cannot trigger the defendant's liability for damages to all the

plaintiffs in the putative class. . . . The idea that individual injury could be settled on a class-wide basis is preposterous." *Id.* *Rutstein*'s conflict with the decision below is stark. *See also Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001) ("[A]ssessing damages for these inherently individual injuries compels an inquiry into each class member's individual circumstances."); *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1006 (11th Cir. 1997) ("plaintiffs' claims will require distinctly case-specific inquiries into the facts surrounding each alleged incident of discrimination").

e. Respondent erroneously contends (Opp. 1-2, 13-15) that this case is a poor vehicle for addressing the *Teamsters* issue because only 28 plaintiffs are involved. But the district court here found that, because of the widely-varying circumstances of the plaintiffs, "this case may be in danger of passing" the "realistic limit on what a jury may reasonably be expected to absorb, retain, and process," and that, in these circumstances, a *Teamsters* bifurcation "would be unduly prejudicial to the defendants" and "would be subject to serious constitutional challenges." Pet. App. 121a, 124a; *see also* Pet. App. 75a-76a. Thus, while respondent may not believe that 28 plaintiffs can create case management and/or constitutional problems, the district court here found to the contrary. In light of the district court's findings on these critical issues, the case presents an ideal vehicle for deciding whether the *Teamsters* multi-stage trial plan is mandatory where juriable claims for legal relief are involved.

f. Finally, respondent does not contest the importance of the *Teamsters* issue. Nor could he. As *amici* filings by the Chamber of Commerce, National Association of Manufacturers, and Washington Legal Foundation make clear, the *Teamsters* issue has great importance and arises with great frequency. *See* WLF Br. 16-17; Chamber Br. 4, 10. It is an issue with which lower courts have struggled, in large part because this Court has never considered *Teamster*'s applicability to juriable claims for legal relief. Accordingly,

there is little prospect of the circuit split resolving without guidance from this Court. Particularly given the constitutional dimension of the issue, that guidance should be provided immediately.

4. Respondent never seriously disputes any of the three circuit splits or the recurrence and importance of the issues surrounding the Tenth Circuit's application and extension of the "continuing violation" doctrine. Indeed, respondent never even mentions the third timeliness conflict regarding application of the "continuing violation" doctrine to instances of discrete adverse employment actions, such as terminations or failures to promote. Respondent instead opposes certiorari almost entirely on case-specific grounds that are meritless.

a. Respondent first suggests (Opp. 15-16) that the timeliness issues raised by the petition are not ripe for review because, in remanding to the district court, the Tenth Circuit held that claims arising more than 300 days prior to the filing of respondent's EEOC charge will be untimely if plaintiffs cannot establish that the alleged pattern or practice of discrimination continued into the charge-filing period. Pet. App. 19a-20a & n.9, 21a-24a. But the question whether *any* pre-charge-filing claims of respondent may be the basis for recovery, even if the alleged pattern or practice continued into the charge-filing period, is plainly ripe for review. Likewise, whether the claims of the eight opt-in plaintiffs which arose entirely outside of the charge-filing period may be the basis for recovery is also a question plainly ripe for review. Those claims were held untimely by the district court; and the Tenth Circuit's use of the "continuing violation" doctrine to revive them conflicts with the decisions of other courts. That the claims may yet fail on *other* grounds does not lessen the judicial conflict or alter the significance of the Tenth Circuit's ruling on this particular ground. As this Court has recognized numerous times, that potentially dispositive questions will remain after this Court's decision is a reason for remanding after reversal, not for denying certiorari. *See, e.g., TRW, Inc.*

v. Andrews, 123 S. Ct. 441, 451 (2001); *Cooper Indus. Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431 (2001).

b. Respondent likewise errs in his effort (Opp. 16-18) to distance this case from *National Railroad Passenger Corp. v. Morgan*, No. 00-1614. To the extent that respondent argues that *Morgan* concerns only the application of the "continuing violation" doctrine where an individual is subject to alleged "serial" violations, he in fact confirms that this case presents a distinct question meriting this Court's review — namely, whether the "continuing violation" doctrine may be used to revive the otherwise stale claims of class members who, as alleged here, are victims of a "pattern or practice" of discrimination. Moreover, to the extent that respondent argues that *Morgan* will itself potentially address or resolve all of the three legal questions raised by the Tenth Circuit's application of the "continuing violation" doctrine, the appropriate and standard course of action is to hold the petition until *Morgan* has been decided. The case should not be sent back to the district court until the many circuit conflicts raised by the decision below have been resolved.

c. Finally, respondent errs in suggesting (Opp. 17) that the decision below is not in conflict with *Hipp v. Liberty National Life Insurance Co.*, 252 F.3d 1208 (11th Cir. 2001), *cert. denied*, 2002 WL 232923 (Feb. 19, 2002). *Hipp* holds that a plaintiff *cannot* "revive a stale claim simply because the allegedly discriminatory policy still exists and is being enforced against others." *Id.* at 1221. That holding conflicts with the decision below and, as explained in the petition (at 27-28), presents a question requiring prompt review by this Court. Because *Morgan* does not appear to present this recurring question, the Court should grant this petition to resolve the circuit conflict.

CONCLUSION

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

STEVEN T. CATLETT
JONES, DAY, REAVIS & POGUE
77 West Wacker Drive
Chicago, IL 60601
(312) 782-3939

GLEN D. NAGER
(Counsel of Record)
LAWRENCE D. ROSENBERG
DOMINICK V. FREDA
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939
Counsel for Petitioners